

THE INDIAN SUCCESSION ACT

BEING

(ACT NO. XXXIV OF 1925)

FOR

STUDENTS & PRACTITIONERS

BY

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PREFACE.

My first edition of the Indian Succession Act X of 1865 was primarily designed to aid the students in grasping the essential principles of testamentary and intestate succession, the execution and construction of wills, and the procedure of obtaining probate and letters of administration; and having the object of helping the students, in view, I had departed from the usual method of annotation of law books adopted here, viz., of giving sections and commentaries, but explained the principles of the Act in the beginning, dividing the subject into different chapters, quoting the sections of the Act in their appropriate places, and giving the text of the Act at the end. I am informed that this method was found very useful and simple to students. My book was also found useful to practitioners.

Taking advantage of the passing of the new Succession Act, I have attempted in this work a complete commentary of the same; but I had perforce to abandon the method observed in my first work and to adopt the old and the usual method. The new Act is a consolidating Act and is an attempt of the legislature to embody into one comprehensive Act, the law of testamentary and intestate succession applicable to all the classes in British India, instead of having different Acts for different communities. This Act is certain to simplify the work of lawyers. The principal Acts embodied in the new Act are—The Indian Succession Act of 1865, The Parsi Intestate Succession Act of 1865, The Hindu Wills Act, the Probate Act &c. &c. by the same law that prevailed before is re-enacted.

I have, in preparing the commentaries, kept in mind the view of helping the students and in the first portions of the commentaries I have explained in easy language the principles of the section and wherever necessary I have grouped several sections together and given the commentary at the last section and typical cases are given in the shape of examples. For aiding memory, I have embodied rules which are taken from text writers and have framed rules on the subject and these rules will be found very helpful both to students and to practitioners.

I hope the present work will be found very helpful to legal practitioners, as all the important cases are quoted in their appropriate places, the index is made very copious and the case law is brought upto date. At the foot of each section is given in italics the corresponding section of the repealed acts and the changes effected are pointed out. For easy reference to the sections of the repealed acts, I have prepared a table in the beginning which will be found very useful to practitioners.

I have added at the end of the Act appendices. The first appendix is on the subject of the Probate Duty and is an attempt at annotations of certain sections of the Court Fees Act relating to this subject. The other appendices contain several acts relating to the branch of law embodied in the new Act which acts have not been repealed.

separately mentioned throughout the Bill. This and other similar sections may need to be qualified if and when the Special Marriage (Amendment) Bill, which has just been passed by the Indian Legislature, becomes law.

Clauses 6 to 29 deal with domicile and are reproductions of the corresponding sections of the Act of 1865. They are for the most part general rules which might well be applicable to all classes, but clause 5, reproducing section 331 of the Act of 1865, excludes their application in the case of Hindus, Muhammadans, Buddhists, Sikhs and Jains.

Part III deals with intestate succession and is based on the appropriate provisions of the Indian Succession Act, 1865 (X of 1865) and the Parsi Succession Act, 1865 (XXI of 1865).

Clauses 46 to 52 and Schedule II contain special rules as to intestate succession among Parsis.

Clause 53.—The proviso to this clause gives effect to one of the provisions of section 8 of the Parsi Succession Act and, taken together with the preceding clauses reproduces the whole of that Act, which it is therefore proposed to repeal.

Part IV deals with testamentary succession.

Clause 54, read with Schedule III, reproduces those provisions of the Hindu Wills Act, 1870 (XXI of 1870), which relate to testamentary succession. Section 187 of the Indian Succession Act, 1865 (X of 1865), as applied by the Hindu Wills Act, has been dealt with in another part of the Bill and will be dealt with under the appropriate clause.

Part V deals with protection of the property of the deceased. It is largely based on the Succession (Property Protection) Act, 1841 (XIX of 1841). This Act was framed under the old system of drafting and certain slight verbal changes of language have had necessarily been made in introducing its provisions in the consolidated Bill, but reference will be made under the appropriate clauses to all changes which are other than purely verbal.

Clause 18.—This clause is taken from section 23 of the Succession Certificate Act, 1889 (VII of 1889), but which, as it limits the power of the curator, appropriately falls in this Part of the consolidated Bill.

Clause 197.—The words "moveable" and "immoveable" have been substituted for the words "personal" and "real"

Clause 198.—The words "High Court" have been substituted here and in other places in this Part where they occur for the words "Court of Sadar Diwani Adalat."

Clauses 204, 205 and 206.—These clauses have been recast as they are drawn in a form which is no longer employed in modern Acts.

Part VI.—This is an important portion of the Bill which deals with title to the property of the deceased. It is only by separating these provisions of the law that a clear view can be obtained of the requirements of the Indian law as to grants by the Court in the case of the estate of a deceased person. By separating the law in this manner, the consolidation of those provisions of the law relating to probate and

grant of administration which are now contained in the Indian Succession Act, 1865 (X of 1865), and the Probate and Administration Act, 1881 (V of 1881), are rendered possible.

Clause 210.—This reproduces the important section 190 of Act X of 1865 which requires that no right to any part of the property of a person who has died intestate can be established in any Court without letters of administration. The very important qualification which excludes the operation of this section in the case of the intestacy of Hindus, Muhammadans, Buddhists, Sikhs, Jains and Indian Christians is based on section 331 of Act X of 1865 and section 3 of Act VII of 1901.

Clause 211 reproduces the corresponding important provision in the case of testate succession contained in section 187 of Act V of 1865 with the important qualification provided for by section 331 of Act X of 1865 and with the application of section 187 of Act X of 1865 read with section 2 of the Hindu Wills Act, 1870 (XXI of 1870).

Clause 212 reproduces the provisions of section 4 of the Succession Certificate Act, 1889 (VII of 1889).

Clause 213.—This clause is intended to reproduce the effect of section 152 of the Probate and Administration Act and section 21 of the Succession Certificate Act, and appears to come in appropriately under this Part of the Bill since it deals with the substitution of the title of the grantee for that of the certificate holder.

With reference to this Part of the Bill, it will be observed that the arrangement of the clauses brings out very clearly the anomalous position in the Indian law with regard to the requirements of proof of representative title to the property of a deceased person.

Part VII.—The provisions of the Indian law regarding the grant of probate and administration of the assets of a deceased person are to be found in the Indian Succession Act, 1865 (X of 1865), and the Probate and Administration Act, 1881 (V of 1881). Those sections of the two Acts which relate to the grant of probate and administration of the assets of deceased persons of all classes covered by the two Acts have already been disposed of by the preceding clauses. With the exceptions the provisions of the two Acts on the subject are with comparatively small differences identical. This Part of the Bill therefore provides in general terms for the administration of the assets of deceased persons of all classes covered by the two Acts in question and provides in its separate clauses such special exceptions which are necessitated in order that the existing law may be reproduced.

Clause 215 reproduces section 179 of Act X of 1865 subject to the proviso in the case of survivorship for those classes of persons who are provided for by section 4 of Act V of 1881.

Clause 218.—As in the case of Hindus, Muhammadans, Buddhists, Sikhs, Jains and exempted persons, probate can be granted to a married woman without the consent of her husband, the provisions of section 8 of Act V of 1881 are here incorporated with those of section 183 of Act X of 1865.

Clause 222.—Here, again, section 13 of Act V of 1881 is incorporated with section 189 of Act X of 1865 for the same reason.

Clauses 233 and 234.—The right to the grant of administration is dealt with by section 23 of Act V of 1881 and by sections 200 to 207 of Act X of 1865. Clause 233 reproduces the former rule and clause 234 the latter.

Clause 212.—Section 212 of the Act of 1865 uses the word "attorney". Section 28 of the Act of 1881 uses the word "agent." Both words are used in the consolidated Bill.

Clauses 210 and 211.—The same remarks apply as in the case of clause 239.

Clause 212.—In view of the wider scope of the Bill, the language of section 31 of the Act of 1881 has been followed, *i. e.* the words "had attained his majority" have been substituted for the words "shall have completed the age of 18 years".

Clause 214.—Section 217 of the Act of 1865 does not deal with the case of minors. Section 33 of the Act of 1881 does. As it appears to be merely *casus omissus* and the provision is in accordance with actual practice, the language of section 33 of the Act of 1881 has been adopted.

Clause 216.—The same remarks apply as in the case of clauses 240 and 241.

Clause 217.—Curiously enough both section 36 of the Act of 1881 and section 226 of the Act of 1865 use the word "attorney". It would appear a drafting slip in the Act of 1881 and the words "or agent" have been added.

Clause 218.—The language of section 37 of the Act of 1881 has been adopted, but there is no change in the substance.

Clause 219.—The proviso incorporates the provisions of section 2 of the Act of 1881.

Clause 267.—Sub-section (2) incorporates the provision of section 3 of Act VII of 1901 and as the provision is not incorporated in the Act of 1881, it excludes the persons to whom that Act relates from the purview of the clause.

Clause 274.—The law to be reproduced is contained in section 244 of the Act of 1865 and section 62 of the Act 1881. The latter Act, however, contains the additional words "or for letters of administration with will annexed" and also the words "or in the cases mentioned in sections 24, 25 and 26 a copy, draft or statement of the contents thereof". The provisions of the Act of 1881 seem necessary to complete the law and they have been adopted *mutatis mutandis* in the clause.

place of abode" are used in the Bill in this clause also in order that the wording of the clause may be consistent with the wording of clause 274. Furthermore, although section 244 requires in the case of an application to a District Judge that the petition should state that the deceased had "his fixed place of abode" within the jurisdiction of the Judge, that section in the case of an application to a District Delegate requires that the petition shall state that the deceased "resided" within the jurisdiction of the Delegate. This discrepancy is apparently explained by the fact that the paragraph was inserted by the District Delegates Act, 1881 (VI of 1881). Section 62 on the contrary uses the phrase "fixed place of abode" in both places. It seems doubtful whether it is necessary to maintain the discrepancy in the language of section 244 and the Bill uses "fixed place of abode" in both places, but it seems that attention should be drawn to the point.

Clause 289.—The proviso embodies the different rules provided by section 78 of the Act of 1881.

Clause 295.—This reproduces section 333 of Act X of 1865 and section 157 of Act V of 1881 which are in identical terms. These sections were added in their respective Acts by section 17 of Act VI of 1889 and are obviously out of position in those Acts.

Clause 299.—The proviso embodies the provisions in that behalf in section 2 of Act V of 1881.

Clause 302.—This clause is necessary as the provisions of the Act of 1865 relating to "executors of their own wrong" were not included in the Act of 1881.

Clause 305.—The wording of section 88 of the Act of 1881 has been adopted. It is more in consonance with the language of the Indian draftsman and involves no change of substance.

Clause 307.—Sub-section (2) reproduces the provisions of section 90 of the Act of 1881 which were inserted in that Act by section 14 of Act VI of 1890.

Clause 311.—The words "in the absence of any directions to the contrary in the will or grant of letters of administration" which occur in section 93 of the Act of 1881 have been adopted in the clause as they appear to state the law more accurately.

Clause 316.—The wording of section 97 of the Act of 1881 has been followed as it is more suitable to the wider scope of the consolidated Bill and involves no change of substance.

Clause 321.—This reproduces section 283 of the Act of 1865. Neither this section nor section 284 has a corresponding provision in the Act of 1881. Sub-clause (3), therefore, excludes from the operation of the clause those to whom the Act of 1881 applies.

Clause 327.—Here again the wording of section 107 of the Act of 1881 has been adopted as it states the law more accurately.

Clauses 230 and 231.—The right to the grant of administration is dealt with by section 23 of Act V of 1881 and by sections 200 to 207 of Act X of 1865. Clause 233 reproduces the former rule and clause 234 the latter.

Clause 232.—Section 212 of the Act of 1865 uses the word "attorney". Section 28 of the Act of 1881 uses the word "agent." Both words are used in the consolidated Bill.

Clauses 240 and 241.—The same remarks apply as in the case of clause 239.

Clause 242.—In view of the wider scope of the Bill, the language of section 31 of the Act of 1881 has been followed, *i. e.*, the words "had attained his majority" have been substituted for the words "shall have completed the age of 18 years".

Clause 244.—Section 217 of the Act of 1865 does not deal with the case of minors. Section 33 of the Act of 1881 does. As it appears to be merely *casus omissus* and the provision is in accordance with actual practice, the language of section 33 of the Act of 1881 has been adopted.

Clause 246.—The same remarks apply as in the case of clauses 240 and 241.

Clause 247.—Curiously enough both section 36 of the Act of 1881 and section 226 of the Act of 1865 use the word "attorney". It would appear a drafting slip in the Act of 1881 and the words "or agent" have been added.

Clause 248.—The language of section 37 of the Act of 1881 has been adopted, but there is no change in the substance.

Clause 262.—The proviso incorporates the provisions of section 2 of the Act of 1881.

Clause 267.—Sub-section (2) incorporates the provision of section 3 of Act VII of 1901 and as the provision is not incorporated in the Act of 1881, it excludes the persons to whom that Act relates from the purview of the clause.

Clause 274.—The law to be reproduced is contained in section 244 of the Act of 1865 and section 62 of the Act 1881. The latter Act, however, contains the additional words "or for letters of administration with will annexed" and also the words "or in the cases mentioned in sections 24, 25 and 26 a copy, draft or statement of the contents thereof". The provisions of the Act of 1881 seem necessary to complete the law and they have been adopted *mutatis mutandis* in the clause.

Clause 275.—Similarly the words "copy of draft" which only occur in section 63 of the Act of 1881 have been adopted.

Clause 276.—This clause is based on section 246 of the Act of 1865 and section 64, Act V of 1881. Here again there is a discrepancy between the two sections. Under section 246 a petition must state that the deceased left some property within the jurisdiction of the District Judge or District Delegate to whom the application is made. Under section 64 in the case of an application to a District Judge the petition must state either that the deceased at the time of his death had a fixed place of abode or had some property situate within the jurisdiction of the Judge. The Bill follows the language of section 246. As a slight change in the law is involved attention is drawn to the point, and similarly to the fact that the words "a fixed

clause 214 (1) (a) and in the heading to the Part we have added the words "on succession" as a majority of us are of opinion that the addition is necessary to make it clear that no change has been made in the existing law.

Clause 217.—We have amended the clause to make it clear that it refers to intestate as well as testamentary succession.

Part IX, Chapter I.—We have re-arranged the provisions in the following order: (1) administration in case of intestacy, (2) probate, (3) letters of administration.

Clause 215.—The wording of section 32 of Act V of 1881 has been followed as this covers both cases.

Clause 207 (3).—The word "truly" has been added to remove any doubt as to what is clearly the intention of the provision.

Clause 278 (1) (e).—The wording has been assimilated to that in clause 274 (2) (a).

Clause 291.—In the case of probate a bond can only be demanded from the special classes to whom Act V of 1881 applies.

Clause 302 (of the original Bill).—We have omitted this clause. Chapter enunciates general principles of law which *suo vigore* apply to all the other specified communities.

Clauses 323 and 352.—The words added have been taken from section 131 of Act V of 1881.

Clause 323.—The words omitted are merely explanatory and are found in section 104 of Act V of 1881.

Clause 332.—An administrator is not mentioned in section 292 of 1865 but for the reasons given in the note on this clause attached to the Bill we are of opinion that an administrator should also be mentioned here.

Schedule III.—The necessary omission in section 70 has been made: the first proviso contained in section 3 of Act XXI of 1870. We have from this Schedule section 72 which deals with the revocation of privileged section 65 which permits of privileged wills being made is not included. Inclusion then of section 59 of the Indian Succession Act, 1865 (now clause Bill in section 2 of the Hindu Wills Act, 1870), was meaningless as section of former Act was not also included.

5. The publication ordered by the Council has been made as follows:

In English

<i>Gazette.</i>				<i>Date.</i>
Gazette of India	...	...	...	4-8-23
Fort Saint George Gazette	...	...	...	21-8-23
Bombay Government Gazette	...	...	...	4-10-23
Calcutta Gazette	...	...	...	5-9-23
United Provinces Gazette...	...	...	...	25-8-23
Punjab Government Gazette	...	...	...	25-9-23

Section of Act X of 1865.	Section of the New Act.	Section of Act X of 1865.	Section of the New Act
Part XXIX.—Of Grant of Probate and Letters of Administration.		Part XXX.— <i>contd.</i>	
179	211	221	250
180	228	222	251
181	222 (1)	223	252
182	222 (2)	224	253
183	223	225	254
184	224	<i>Grants with exception.</i>	
185	225	226	255
186	226	227	256
187	213	<i>Grants of the rest.</i>	
188	227	228	257
189	236	<i>Grants or effects unadministered.</i>	
190	212	229	258
191	220	230	259
192	221	231	260
193	229	<i>Alteration in grants.</i>	
194	230	232	261
195	231	233	262
196	232	<i>Relocation of grants.</i>	
197	233	234	263
198	234	Part XXXI.—Of the Practice in granting and revoking Probate and Letters of Administration.	
199	235	235	264
200	219	235A	265
201	219 (a)	236	266
202	219 (b)	237	267
203	219 (c)	238	268
204	219 (d)	239	269
205	219 (e)	240	270
206	219 (f)	241	271
207	219 (g)	241A	272
Part XXX.—Of Limited Grants.		242	273
<i>Grants limited in duration.</i>		242A	274
208	237	243	275
209	238	244	276
210	239	245	277
211	210	246	278
<i>Grants for the use and benefit of others having right.</i>		246A	279
212	241	247	280
213	242	248	281
214	243	249	282
215	244	250	283
216	245	251	284 (1, 2, 3)
217	246	252	284 (4), Sch. V.
218	247	253	285
<i>Grants for special purposes.</i>		253A	286
219	248	253B	287
	249	253C	288

Section of Act X of 1865.	Section of the New Act.	Section of Act X of 1865.	Section of the New Act.
Part XXXI.— <i>contd.</i>		Part XXXIV.— <i>contd.</i>	
254	289, Sch. VI.	290	330
255	290	291	331
256	291	Part XXXV.—Of the Executor's assent to a legacy.	
257	292	292	332
258	293	293	333
259	294	294	334
260	216	295	335
261	295	296	336
262	297	297	337
263	299	Part XXXVI.—Of the payment and apportionment of annuities.	
264	300	298	338
264A	301	299	339
264B	302	300	340
Part XXXII.—Of Executors of their own wrong.		Part XXXVII.—Of the Investment of Funds to provide for Legacies.	
265	303	301	341
266	304	302	342
Part XXXIII.—Of the powers of an Executor or Administrator.		303	343
267	305	304	344
268	306	305	345
269	307	306	346
269A	308	307	347
269B	309	308	348
270	310	Part XXXVIII.—Of the Produce and Interest of Legacies.	
271	311	309	349
272	312	310	350
273	313	311	351
274	314	312	352
275	315	313	353
Part XXXIV.—Of the Duties of an Exe- cutor or Administrator.		314	354
276	316	315	355
277	317	Part XXXIX.—Of the Refunding of Legacies.	
277A	318	316	356
278	319	317	357
279	320	318	358
280	321	319	359
281	322	320	360
282	323	321	361
283	324 (1)	322	362
284	324 (2)	323	363
285	325	324	364
286	326	325	365
287	327		
288	328		
289	329		

Section of Act X of 1855.	Section of the New Act.	Section of Act X of 1865.	Section of the New Act.
Part XXXIX.— <i>contd.</i>		Part XL.—Miscellaneous.	
325	356	331	4, 20, 29, 58
325A.	367		212, 213
Part XL.—Of the Liability of an Executor or Administrator for Devastation.		332	3
327	368	333	296
328	369		

(III) The Parsi Intestate Succession Act (XXI of 1865.)

Section of Act XXI of 1865.	Section of the New Act.	Section of Act XXI of 1865.	Section of the New Act.
1	50	5	54
2	51	6	55
3	52	7	56
4	53	8	29(2), 31

First Schedule—Schedule II, Part I
Second Schedule—Schedule II, Part II

(IV) The Hindu Wills Act (XXI of 1870.)

Section of Act XXI of 1870.	Section of the New Act.	Section of Act XXI of 1870	Section of the New Act
2	57, and Sch. III.	6	Sch. III.
3	57, and Sch. III.		

(V) The Probate and Administration Act (V of 1881.)

Section of Act V of 1881.	Section of the New Act.	Section of Act V of 1881.	Section of the New Act.
Chapter I.—Preliminary.		Chapter II.— <i>contd.</i>	
2	217, 261, 300	6	222 (1)
3	2	7	222 (2)
Chapter II.—Of Grant of Probate and Letters of Administration.		8	223
4	211	9	224
5	228	10	225
		11	226

(VI) The District Delegates Act (VI of 1881.)

Section of Act VI of 1881.	Section of the New Act.	Section of Act VI of 1881.	Section of the New Act.
1	Short Title.	7	286, 287, 288,
2	265	8	289 (and Sch.
3	272		VI) 290 (and
4	276 (2) (b),		Sch. VII)
	278 (1) (f),		348
5	281	9	...
6	.		

(VII) The Probate and Administration Act (VI of 1889.)

Section of Act VI of 1889.	Section of the New Act.	Section of Act VI of 1889.	Section of the New Act.
1	Short Title	13	290 & Sch. VII
2	263 (e)	14	307
3	276 (1) (d) & (e)	15	317
4	Sch. VI & Sch. VII	16	...
5	290	17	296
6	291	18	Repealed by Acts XII of 1891
7	317		& XVII of 1914
8	Repealed by Act X of 1914.	19	...
	324	20	Repealed by Act XI of 1899.
	296	21	Repealed by Act XII of 1891.
	263 (e)		
	289 & Sch. VI		

(III) The Succession Certificate Act (VII of 1889.)

Section of the New Act.	Section of Act VII of 1889.	Section of the New Act.
	9	375
370	10	376
...	11	377
370 (2)	12	378
214	13	(Not repealed).
371	14	379
372	15	
373	16	
374	17	

Section of Act V of 1881.	Section of the New Act	Section of Act V of 1881.	Section of the New Act.
Chapter VI.— <i>contd.</i>		Chapter XI.—Of the Produce and Interest of Legacies.	
91	310	128	349
92	311	129	350
93	312	130	351
94	313	131	352
95	314	132	353
96	315	133	354
Chapter VII.—Of the Duties of an Executor or Administrator.		134	355
97	316	Chapter XII.—Of the Refunding of Legacies	
98	317	135	356
99	318	136	357
100	319	137	358
101	320	138	359
102	321	139	360
103	322	140	361
104	323	141	362
105	325	142	363
106	326	143	364
107	327	144	365
108	328	145	366
109	329	145A	367
110	330	Chapter XIII.—Of the Liability of an Executor or Administrator for Devastation.	
111	331	146	368
Chapter VIII.—Of the Executors' Assent to a Legacy.		147	369
112	332	Chapter XIV.—Miscellaneous	
113	333	148	332, 333 (2), 334,
114	334		335, 336, 337,
115	335		339, 342, 344,
116	336		347, 356, 357,
117	337		358, 359, 361,
Chapter IX.—Of the payment and Apportionment of annuities			363,
118	338	149	391
119	339	150	217
120	340	151	Repealed by Act VII of 1889.
Chapter X.—Of the investment of Funds to provide for Legacies.		152	215
121	341	153	Repealed by Act VII of 1889.
122	342		57 & Sch. III
123	343	151	...
124	344	155	Repealed by Act IX of 1908.
125	346	156	296
126	347		
127	348	157	

(VI) The District Delegates Act (VI of 1881.)

Section of Act VI of 1881.	Section of the New Act.	Section of Act VI of 1881.	Section of the New Act.
1	Short Title	7	286, 287, 288,
2	265	8	289 (and Sch.
3	272		VI) 290 (and
4	276 (2) (b), 278 (1) (f),		Sch VII)
5	284	9	348
6	..		...

(VII) The Probate and Administration Act (VI of 1889.)

Section of Act VI of 1889.	Section of the New Act.	Section of Act VI of 1889.	Section of the New Act.
1	Short Title	13	290 & Sch. VII
2	263 (e)	14	307
3	276 (1) (d) & (e)	15	317
4	Sch. VI & Sch. VII	16	...
5	290	17	296
6	291	18	Repealed by Acts XII of 1891
7	317		& XVII of
8	Repealed by Act X of 1914.		1914
9	324	19	...
10	296	20	Repealed by Act XI of 1899.
11	263 (e)	21	Repealed by Act XII of 1891.
12	289 & Sch. VI		

(VIII) The Succession Certificate Act (VII of 1889.)

Section of Act VII of 1889.	Section of the New Act.	Section of Act VII of 1889.	Section of the New Act.
Preamble		9	375
1	370	10	376
2	...	11	377
3 (2)	370 (2)	12	378
4	214	13	(Not repealed)
5	371	14	379
6	372	15	380
7	373	16	381
8	374	17	382

Section of Act VII of 1889.	Section of the New Act.	Section of Act VII of 1889	Section of the New Act.
18	383	25	387
19	384	26	388
20	385	27	389
21	215	28	390
22	386	Schedule I	Repealed
23	197	Schedule II	Schedule IV
24	...		

(IX) The Probate and Administration Act (V of 1890.)

Section of Act V of 1890.	Section of the New Act.	Section of Act V of 1890.	Section of the New Act.
1 to 8	Repealed by Act II of 1913.	10 to 15	Repealed by Act III of 1913.
9	367	16	367

(X) The Native Christians Act (VII of 1901.)

Section of Act VII of 1901.	Section of the New Act	Section of Act VII of 1901.	Section of the New Act.
Preamble		3	212, 269
1	Short title	4	Repealed
2	2 (d)	5	370 (Proviso)

(XI) The Probate and Administration Act (VIII of 1903.)

Section of Act VIII of 1903.	Section of the New Act.	Section of Act VIII of 1903.	Section of the New Act.
1	Short title	2 (7)	318
2 (1)	213	3 (1)	273 (Proviso)
2 (2)	273 (Proviso)	3 (2)	274
2 (3)	274	3 (3)	276 (3),
2 (4)	276 (3),		278 (2).
	278 (2).	3 (4)	283 (3)
2 (5)	279	4	Repealed by
2 (6)	283 (3)		Act X of 1914.

CONTENTS.

PREFACE	...	...	...	...	...	...	iii
STATEMENT OF OBJECTS AND REASONS	...	...	...	...	...	...	v
REPORT OF THE JOINT COMMITTEE	...	...	...	...	...	...	xi
COMPARATIVE TABLE OF THE SECTIONS OF THE OLD AND THE NEW ACT.	...	...	...	...	...	...	xv
TABLE OF CASES CITED	...	...	...	...	...	...	xli

PART I.

PRELIMINARY.

CLAUSES.	PAGE.
1. Short title	1
2. Definitions	5
3. Power of local Government to exempt any race, sect or tribe in the territories administered by the Local Government from operation of Act	9

PART II.

OF DOMICILE.

4. Application of Part	10
5. Law regulating succession to deceased person's immoveable and moveable property, respectively	10
6. One domicile only affects succession to moveables	11
7. Domicile of origin of person of legitimate birth	11
8. Domicile of origin of illegitimate child	11
9. Continuance of domicile of origin	11
10. Acquisition of new domicile	11
11. Special mode of acquiring domicile in British India	12
12. Domicile not acquired by residence as representative of foreign Government, or as part of his family	12
13. Continuance of new domicile	12
14. Minor's domicile	12
15. Domicile acquired by woman on marriage	12
16. Wife's domicile during marriage	12
17. Minor's acquisition of new domicile	13
18. Lunatic's acquisition of new domicile	13
19. Succession to moveable property in British India in absence of proof of domicile elsewhere	13

PART III. MARRIAGE.

CLAUSES.	PAGE.
20. Interests and powers not acquired nor lost by marriage ...	16
21. Effect of marriage between person domiciled and one not domiciled in British India ...	17
22. Settlement of minor's property in contemplation of marriage ...	19

PART IV. OF CONSANGUINITY.

23. Application of Part ...	20
24. Kindred or consanguinity ...	20
25. Lineal consanguinity ...	20
26. Collateral consanguinity ...	21
27. Persons held for purpose of succession to be similarly related to deceased ...	21
28. Mode of computing of degrees of kindred ...	21

PART V. INTESTATE SUCCESSION.

CHAPTER I.

Preliminary.

29. Application of Part ...	22
30. As to what property deceased considered to have died intestate ...	22

CHAPTER II.

Rules in cases of Intestates other than Parsis.

31. Chapter not to apply to Parsis ...	23
32. Devolution of such property ...	23
33. Where intestate has left widow and lineal descendants, or widow and kindred only, on widow and no kindred ...	24
34. Where intestate has left no widow, and where he has left no kindred ...	24
35. Rights of widower ...	24

Distribution where there are lineal descendants.

36. Rules of distribution ...	25
37. Where intestate has left child or children only ...	25
38. Where intestate has left no child, but grand-child or grand-children ...	25
39. Where intestate has left only great-grand-children or remoter lineal descendants ...	25
40. Where intestate leaves lineal descendants not all in same degree of kindred to him, and those through whom the more remote are descended are dead ...	25

Distribution where there are no lineal descendants.

CLAUSES.	PAGE.
41. Rules of distribution where intestate has left no lineal descendants ...	26
42. Where intestate's father living	26
43. Where intestate's father dead, but his mother, brothers and sisters living	27
44. Where intestate's father dead and his mother, a brother or sister, and children of any deceased brother or sister, living ...	27
45. Where intestate's father dead and his mother and children of any deceased brother or sister living	27
46. Where intestate's father dead, but his mother living and no brother, sister, nephew or niece	28
47. Where intestate has left neither lineal descendant, nor father, nor mother	28
48. Where intestate has left neither lineal descendant, nor parent, nor brother, nor sister	28
49. Children's advancement not brought into hotchpot ...	32

CHAPTER III.

Special Rules for Parsi Intestates.

50. Division of property among widow and children of intestate ...	34
51. Division of property among widower and children of intestate ...	34
52. Division of property amongst the children of male intestate who leaves no widow	34
53. Division of property amongst the children of female intestate who leaves no widower	34
54. Division of pre-deceased child's share of intestate's property among the widow or widower and issue of such child	35
55. Division of property when the intestate leaves a widow or widower, but no lineal descendants	35
56. Division of property when the intestate leaves neither widow nor widower, nor lineal descendants	36

PART VI.

TESTAMENTARY SUCCESSION.

CHAPTER I.

Introductory.

57. Application of certain provisions of Part to a class of wills made by Hindus, etc	37
58. General application of Part	38

CHAPTER II.

Of Wills and Codicils.

59. Person capable of making wills	
60. Testamentary guardian	

CLAUSES.	PAGE.
61. Will obtained by fraud, coercion or importunity ...	46
62. Will may be revoked or altered ...	50

CHAPTER III.

Of the Execution of unprivileged Wills.

63. Execution of unprivileged Wills ...	51
64. Incorporation of papers by reference... ..	56

CHAPTER IV.

Of privileged Wills.

65. Privileged wills ...	58
66. Mode of making, and rules for executing, privileged wills ...	58

CHAPTER V.

Of the Attestation, Revocation, Alteration, and Revival of Wills.

67. Effect of gift to attesting witness ...	60
68. Witness not disqualified by interest or by being executor ...	60
69. Revocation of will by testator's marriage ...	62
70. Revocation of unprivileged will or codicil ...	62
71. Effect of obliteration, interlineation or alteration in unprivileged will ...	68
72. Revocation of privileged will or codicil ...	69
73. Revival of unprivileged will ...	70

CHAPTER VI.

Of the Construction of Wills.

74. Wording of will ...	72
75. Inquiries to determine questions as to object or subject of will ...	74
76. Misnomer or misdescription of object ...	76
77. When words may be supplied ...	80
78. Rejection of erroneous particulars in description of subject. ...	81
79. When part of description may not be rejected as erroneous. ...	81
80. Extrinsic evidence admissible in cases of patent ambiguity. ...	82
81. Extrinsic evidence inadmissible in case of patent ambiguity or deficiency ...	83
82. Meaning of clause to be collected from entire will ...	85
83. When words may be understood in restricted sense, and when in sense wider than usual ...	86
84. Which of two possible constructions preferred ...	89
85. No part rejected, if it can be reasonably construed ...	89
86. Interpretation of words repeated in different parts of will ...	89
87. Testator's intention to be effectuated as far as possible ...	89
88. The last of two inconsistent clauses prevails ...	90
89. Will or bequest void for uncertainty ...	90
90. Words describing subject refer to property answering description at testator's death ...	93
91. Power of appointment executed by general bequest ...	95

CLAUSES.	PAGE.
92. Implied gift to objects of power in default of appointment	95
93. Bequest to "heirs," etc., of particular person without qualifying terms	98
94. Bequest to "representatives," etc., of particular person	100
95. Bequest without words of limitation	101
96. Bequest in alternative	103
97. Effect of words describing a class added to bequest to person	105
98. Bequest to class of persons under general description only	107
99. Construction of terms	110
100. Words expressing relationship denote only legitimate relatives or failing such relatives reputed legitimate	111
101. Rules of construction where will purports to make two bequests to same person	113
102. Constitution of residuary legatee	115
103. Property to which residuary legatee entitled	115
104. Time of vesting legacy in general terms	117
105. In what case legacy lapses	118
106. Legacy does not lapse if one of two joint legatees die before testator	120
107. Effect of words showing testator's intention to give distinct shares	120
108. When lapsed share goes as undisposed of	122
109. When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime	123
110. Bequest to A for benefit of B does not lapse by A's death	124
111. Survivorship in case of bequest to described class	124

CHAPTER VII.

Of void Bequests.

112. Bequest to person by particular description, who is not in existence at testator's death	128
113. Bequest to person not in existence at testator's death, subject to prior bequest	129
114. Rule against perpetuity	131
115. Bequest to a class some of whom may come under rules in sections 113 and 114	139
116. Bequest to take effect on failure of bequest void under section 113, 114 or 115	142
117. Effect of direction for accumulation	143
118. Bequest to religious or charitable uses	145

CHAPTER VIII

Of the vesting of Legacies.

119. Date of vesting of legacy when payment or possession postponed	151
120. Date of vesting when legacy contingent upon specified uncertain event	152
121. Vesting of interest in bequest to such members of a class as shall have attained particular age	161

CHAPTER IX.

Of Onerous Bequests.

CLAUSES.	PAGE.
122. Onerous bequests.	162
123. One of two separate and independent bequests to same person may be accepted, and other refused	162

CHAPTER X.

Of Contingent Bequests.

124. Bequest contingent upon specified uncertain event, no time being mentioned for its occurrence	163
125. Bequest to such of certain persons as shall be surviving at some period not specified... ..	166

CHAPTER XI.

Of Conditional Bequests.

126. Bequest upon impossible condition	168
127. Bequest upon illegal or immoral condition	168
128. Fulfilment of condition precedent to vesting of legacy	170
129. Bequest to A and on failure of prior bequest to B.	174
130. When second bequest not to take effect on failure of first	174
131. Bequest over, conditional upon happening or not happening of specified uncertain event	175
132. Condition must be strictly fulfilled	177
133. Original bequest not affected by invalidity of second	177
134. Bequest conditioned that it shall cease to have effect in case a specified uncertain event shall happen, or not happen	178
135. Such condition must not be invalid under section 120	179
136. Result of legatee rendering impossible or indefinitely postponing act for which no time specified, and on non-performance of which subject-matter to go over	179
137. Performance of condition, precedent or subsequent, within specified time. Further time in case of fraud	179

CHAPTER XII.

Of Bequests with Directions as to Application of Enjoyment.

138. Direction that fund be employed in particular manner following absolute bequest of same to or for benefit of any person	181
139. Direction that mode of enjoyment of absolute bequest is to be restricted, to secure specified benefit for legatee	183
140. Bequest of fund for certain purposes, some of which cannot be fulfilled	183

CHAPTER XIII.

Of Bequests to an Executor

141. Legatee named as executor cannot take unless he shows intention to act as executor	186
--	-----

CHAPTER XIV.

Of Specific Legacies.

CLAUSES.	PAGE.
142. Specific legacy defined	187
143. Bequest of certain sum where stocks, etc., in which invested are described	191
144. Bequest of stock where testator had, at date of will, equal or greater amount of stock of same kind	191
145. Bequest of money where not payable until part of testator's property disposed of in certain way	192
146. When enumerated articles not deemed specifically bequeathed ...	193
147. Retention, in form, of specific bequest to several persons in succession	193
148. Sale and investment of proceeds of property bequeathed to two or more persons in succession	193
149. Where deficiency of assets to pay legacies, specific legacy not to abate with general legacies	194

CHAPTER XV.

Of Demonstrative Legacies.

150. Demonstrative legacy defined	194
151. Order of payment when legacy directed to be paid out of fund the subject of specific legacy	195

CHAPTER XVI.

Of Ademption of Legacies.

152. Ademption explained	195
153. Non-ademption of demonstrative legacy	197
154. Ademption of specific bequest of right to receive something from third party	197
155. Ademption <i>pro tanto</i> by testator's receipt of part of entire thing specifically bequeathed	198
156. Ademption <i>pro tanto</i> by testator's receipt of portion of entire fund of which portion has been specifically bequeathed	198
157. Order of payment where portion of fund specifically bequeathed to one legatee, and legacy charged on same fund to another, and, testator having received portion of that fund, remainder insufficient to pay both legacies	198
158. Ademption where stock, specifically bequeathed, does not exist at testator's death	199
159. Ademption <i>pro tanto</i> where stock, specifically bequeathed, exists in part only at testator's death	199
160. Non-ademption of specific bequest of goods described as connected with certain place, by reason of removal	200
161. When removal of thing bequeathed does not constitute ademption ...	200
162. When thing bequeathed is a valuable to be received by testator from third person; and testator himself, or his representative, receives it	201

CLAUSES.	PAGE.
163. Change by operation of law of subject of specific bequest between date of will and testator's death	202
164. Change of subject without testator's knowledge... ..	202
165. Stock specifically bequeathed lent to third party on condition that it be replaced	203
166. Stock specifically bequeathed sold but replaced, and belonging to testator at his death	203

CHAPTER XVII.

Of the payment of liabilities in respect of the subject of a bequest.

167. Non-liability of executor to exonerate specific legatees	203
168. Completion of testator's title to things bequeathed to be at cost of his estate	204
169. Exoneration of legatee's immoveable property for which land-revenue or rent payable periodically	205
170. Exoneration of specific legatee's stock in joint stock company	206

CHAPTER XVIII.

Of Bequests of things described in General Terms.

171. Bequest of thing described in general terms	206
---	-----

CHAPTER XIX.

Of Bequests of the Interest or Produce of a Fund.

172. Bequest of interest or produce of Fund	207
--	-----

CHAPTER XX.

Of Bequests of Annuities.

173. Annuity created by will payable for life only unless contrary intention appears by will	208
174. Period of vesting where will directs that annuity be provided out of proceeds of property, or out of property generally, or where money bequeathed to be invested in purchase of annuity	208
175. Abatement of annuity	209
176. Where gift of annuity and residuary gift, whole annuity to be first satisfied	210

CHAPTER XXI.

Of Legacies to Creditors and Portioners.

177. Creditor <i>prima facie</i> entitled to legacy as well as debt	211
178. Child <i>prima facie</i> entitled to legacy as well as portion	211
179. No ademption by subsequent provision for legatee	212

CHAPTER XXII.

Of Election.

180. Circumstances in which election takes place	213
181. Devolution of interest relinquished by owner	213

CLAUSES.

PAGE.

182.	Testator's belief as to his ownership immaterial	...	...	213
183.	Bequest for man's belief how regarded for purpose of election	...	...	216
184.	Person deriving benefit indirectly not put to election	...	...	216
185.	Person taking in individual capacity under will may in other character elect to take in opposition	...	...	216
186.	Exception to provisions of last six sections	...	...	217
187.	When acceptance of benefit given by will constitutes election to take under will	...	...	217
188.	Circumstances in which knowledge or waiver is presumed or inferred...	...	...	218
189.	When testator's representatives may call upon legatee to elect	...	...	219
190.	Postponement of election in case of disability	...	...	219

CHAPTER XXIII.

Of Gifts in Contemplation of Death.

191.	Property transferable by gift made in contemplation of death	...	219
------	--	-----	-----

PART VII.

PROTECTION OF PROPERTY OF DECEASED.

192.	Person claiming right by succession to property of deceased may apply for relief against wrongful possession	...	...	223
193.	Inquiry made by Judge	...	...	224
194.	Procedure	...	...	225
195.	Appointment of curator pending determination of proceeding	...	...	225
196.	Powers conferable on curator	...	...	226
197.	Prohibition of exercise of certain powers by curators. Payment of debts, etc., to curator	...	...	226
198.	Curator to give security and may receive remuneration	...	...	226
199.	Report from Collector where estate includes revenue-paying land	...	...	227
200.	Institution and defence of suits	...	...	227
201.	Allowances to apparent owners pending custody by curator	...	...	227
202.	Accounts to be filed by curator	...	...	228
203.	Inspection of accounts and right of interested party to keep duplicate	...	...	228
204.	Bar to appointment of second curator for same property	...	...	228
205.	Limitation of time for application for curator	...	...	228
206.	Bar to enforcement of Part against public settlement or legal directions by deceased	...	...	229
207.	Court of Wards to be made curator in case of minors having property subject to its jurisdiction	...	...	229
208.	Saving of right to bring suit	...	...	229
209.	Effect of decision of summary proceeding	...	...	229
210.	Appointment of public curators	...	...	230

PART VIII.

REPRESENTATIVE TITLE TO PROPERTY OF DECEASED
ON SUCCESSION.

CLAUSES.	PAGE.
211. Character and property of executor or administrator as such	... 230
212. Right to intestate's property	... 233
213. Right as executor or legatee when established	... 233
214. Proof of representative title a condition precedent to recovery through the Courts of debts from debtors of deceased persons	... 236
215. Effect on certificate of subsequent probate or letters of administration.	240
216. Grantee of probate or administration alone to sue, etc., until same revoked	... 240

PART IX.

PROBATE, LETTERS OF ADMINISTRATION AND ADMINISTRATION
OF ASSETS OF DECEASED.

217. Application of Part	... 241
--------------------------	---------

CHAPTER I.

Of Grant of Probate and Letters of Administration.

218. To whom administration may be granted, where deceased is a Hindu, Muhammadan, Buddhist, Sikh, Jaina or exempted person	... 241
219. Where deceased is not a Hindu, Muhammadan, Buddhist, Sikh, Jaina or exempted person	... 242
220. Effect of letters of administration	... 245
221. Acts not validated by administration	... 245
222. Probate only to appointed executor	... 246
223. Persons to whom probate cannot be granted	... 251
224. Grant of probate to several executors simultaneously or at different times	... 253
225. Separate probate of codicil discovered after grant of probate	... 253
226. Accrual of representation to surviving executor...	... 254
227. Effect of probate	... 255
228. Administration with copy annexed of authenticated copy of will proved abroad	... 258
229. Grant of administration where executor has not renounced...	... 260
230. Form and effect of renunciation of executorship...	... 261
231. Procedure where executor renounces or fails to accept within time limited	... 262
232. Grant of administration to universal or residuary legatees	... 263
233. Right to administration of representative of deceased residuary legatee.	263
234. Grant of administration where no executor, nor residuary legatee, nor representative of such legatee	... 264
235. Citation before grant of administration to legatee other than universal or residuary	... 264
236. To whom administration may not be granted	... 266

CHAPTER II.

*Of limited Grants.**Grants limited in duration.*

CLAUSES.	PAGE.
237. Probate of copy or draft of lost will	267
238. Probate of contents of lost or destroyed will	267
239. Probate of copy where original exists	268
240. Administration until will produced	269

Grants for the use and benefit of others having right.

241. Administration, with will annexed, to attorney of absent executor ...	269
242. Administration, with will annexed, to attorney of absent person who, if present, would be entitled to administer	270
243. Administration to attorney of absent person entitled to administer in case of intestacy	271
244. Administration during minority of sole executor or residuary legatee...	271
245. Administration during minority of several executors or residuary legatees	271
246. Administration for use and benefit of lunatic or minor	273
247. Administration <i>pendente lite</i>	274

Grants for special purposes.

248. Probate limited to purpose specified in will	275
249. Administration, with will annexed, limited to particular purpose ...	275
250. Administration limited to property in which person has beneficial interest	276
251. Administration limited to suit	276
252. Administration limited to purpose of becoming party to suit to be brought against administrator	276
253. Administration limited to collection and preservation of deceased's property	277
254. Appointment, as administrator, of person other than one who, in ordinary circumstances, would be entitled to administration	277

Grants with exception.

255. Probate or administration, with will annexed, subject to exception ...	278
256. Administration with exception	278

Grants of the rest.

257. Probate or administration of rest	280
---	-----

Grant of effects unadministered.

258. Grant of effects unadministered	280
259. Rules as to grants of effects unadministered	281
260. Administration when limited grant expired and still some part of estate unadministered ... ..	...

CHAPTER III.

Alteration and Revocation of Grants.

CLAUSES.	PAGE.
261. What errors may be rectified by Court	282
262. Procedure where codicil discovered after grant of administration with will annexed	282
263. Revocation or annulment for just cause	283

CHAPTER IV.

Of the practice in granting and revoking Probates and Letters of Administration.

264. Jurisdiction of District Judge in granting and revoking probates, etc....	291
265. Power to appoint Delegate of District Judge to deal with non-contentious cases	292
266. District Judge's powers as to grant of probate and administration ...	292
267. District Judge may order person to produce testamentary papers ...	292
268. Proceedings of District Judge's Court in relation to probate and administration	293
269. When and how District Judge to interfere for protection of property ...	294
270. When probate or administration may be granted by District Judge ...	295
271. Disposal of application made to Judge of district in which deceased had no fixed abode	295
272. Probate and letters of administration may be granted by Delegate ...	296
273. Conclusiveness of probate or letters of administration	296
274. Transmission to High Courts of certificate of grants under proviso to section 273	298
275. Conclusiveness of application for probate or administration if properly made and verified	298
276. Petition for probate	299
277. In what cases translation of will to be annexed to petition. Verification of translation by person other than Court translator ...	301
278. Petition for letters of administration... ..	301
279. Addition to statement in petition, etc., for probate or letters of administration in certain cases... ..	302
280. Petition for probate, etc., to be signed and verified	303
281. Verification of petition for probate, by one witness to will	303
282. Punishment for false averment in petition or declaration	303
283. Powers of District Judge	303
284. Caveats against grant of probate or administration. Form of caveat... ..	304
285. After entry of caveat, no proceeding taken on petition until after notice to caveator	305
286. District Delegate when not to grant probate or administration	306
287. Power to transmit statement to District Judge in doubtful cases where no contention	306
288. Procedure where there is contention, or District Delegate thinks probate or letters of administration should be refused in his Court	306
289. Grant of probate to be under seal of Court	307
290. Grant of letters of administration to be under seal of Court	307

CLAUSES.	PAGE.
354. No interest on arrears of annuity within first year after testator's death	355
355. Interest on sum to be invested to produce annuity ...	355

CHAPTER XII.

Of the Refunding of Legacies.

356. Refund of legacy paid under Court's orders	355
357. No refund if paid voluntarily	356
358. Refund when legacy has become due on performance of condition within further time allowed under section 137	356
359. When each legatee compellable to refund in proportion	356
360. Distribution of assets	357
361. Creditor may call upon legatee to refund	357
362. When legatee, not satisfied or compelled to refund under section 361, cannot oblige one paid in full to refund	358
363. When unsatisfied legatee must first proceed against executor, if solvent	358
364. Limit to refunding of one legatee to another	358
365. Refunding to be without interest	359
366. Residue after usual payments to be paid to residuary legatee	359
367. Transfer of assets from British India to executor or administrator in country of domicile for distribution	360

CHAPTER XIII.

Of the Liability of an Executor or Administrator for Devastation.

368. Liability of executor or administrator for devastation	360
369. Liability of executor or administrator for neglect to get in any part of property	361

PART X.

SUCCESSION CERTIFICATES.

370. Restriction on grant of certificates under this Part	366
371. Court having jurisdiction to grant certificate	368
372. Application for certificate	369
373. Procedure on application	370
374. Contents of certificate	371
375. Requisition of security from grantee of certificate	372
376. Extension of certificate	372
377. Forms of certificate and extended certificate	373
378. Amendment of certificate in respect of powers as to securities	373
379. Mode of collecting Court-fees on certificates	373
380. Local extent of certificate	374
381. Effect of certificate	374
382. Effect of certificate granted or extended by British representative in Foreign State	374
383. Revocation of certificate	375
384. Appeal	376
385. Effect on certificate of previous certificate, probate or letters of administration	377

CLAUSES.	PAGE.
325. Debts to be paid before legacies	339
326. Executor or administrator not bound to pay legacies without indemnity	339
327. Abatement of general legacies	339
328. Non-abatement of specific legacy when assets sufficient to pay debts ...	341
329. Right under demonstrative legacy when assets sufficient to pay debts and necessary expenses	341
330. Rateable abatement of specific legacies	341
331. Legacies treated as general for purpose of abatement	342

CHAPTER VIII.

Of assent to a legacy by Executor or Administrator.

332. Assent necessary to complete legatee's title	342
333. Effect of executor's assent to specific legacy	343
334. Conditional assent	343
335. Assent of executor to his own legacy	344
336. Effect of executor's assent	345
337. Executor when to deliver legacies	345

CHAPTER IX.

Of the Payment and Apportionment of Annuities.

338. Commencement of annuity when no time fixed by will	346
339. When annuity, to be paid quarterly or monthly, first falls due ...	346
340. Dates of successive payments when first payment directed to be made within a given time or on day certain: death of annuitant before date of payment	347

CHAPTER X.

Of the Investment of Funds to provide for Legacies.

341. Investment of sum bequeathed where legacy, not specific, given for life.	347
342. Investment of general legacy, to be paid at future time: disposal of intermediate interest	347
343. Procedure when no fund charged with, or appropriated to annuity ...	348
344. Transfer to residuary legatee of contingent bequest	348
345. Investment of residue bequeathed for life, without direction to invest in particular securities	349
346. Investment of residue bequeathed for life, with direction to invest in specific securities	349
347. Time and manner of conversion and investment	349
348. Procedure where minor entitled to immediate payment or possession of bequest, and no direction to pay to person on his behalf	351

CHAPTER XI.

Of the Produce and Interest of Legacies.

349. Legatee's title to produce of specific legacy	352
350. Residuary legatee's title to produce of residuary fund	353
351. Interest when no time fixed for payment of general legacy	353
352. Interest when time fixed	354
353. Rate of interest	355

CLAUSES.	PAGE.
354. No interest on arrears of annuity within first year after testator's death	355
355. Interest on sum to be invested to produce annuity ...	355

CHAPTER XII.

Of the Refunding of Legacies.

356. Refund of legacy paid under Court's orders	355
357. No refund if paid voluntarily	356
358. Refund when legacy has become due on performance of condition within further time allowed under section 137	356
359. When each legatee compellable to refund in proportion	356
360. Distribution of assets	357
361. Creditor may call upon legatee to refund	357
362. When legatee, not satisfied or compelled to refund under section 361, cannot oblige one paid in full to refund	358
363. When unsatisfied legatee must first proceed against executor, if solvent	358
364. Limit to refunding of one legatee to another	358
365. Refunding to be without interest	359
366. Residue after usual payments to be paid to residuary legatee	359
367. Transfer of assets from British India to executor or administrator in country of domicile for distribution	360

CHAPTER XIII.

Of the Liability of an Executor or Administrator for Devastation.

368. Liability of executor or administrator for devastation	360
369. Liability of executor or administrator for neglect to get in any part of property	361

PART X.

SUCCESSION CERTIFICATES.

370. Restriction on grant of certificates under this Part	366
371. Court having jurisdiction to grant certificate	368
372. Application for certificate	369
373. Procedure on application	370
374. Contents of certificate	371
375. Requisition of security from grantee of certificate	372
376. Extension of certificate	372
377. Forms of certificate and extended certificate	373
378. Amendment of certificate in respect of powers as to securities	373
379. Mode of collecting Court-fees on certificates	373
380. Local extent of certificate	374
381. Effect of certificate	374
382. Effect of certificate granted or extended by British representative in Foreign State	374
383. Revocation of certificate	375
384. Appeal	376
385. Effect on certificate of previous certificate, probate or letters of administration	377

CLAUSES.	PAGE.
386. Validation of certain payments made in good faith to holder of invalid certificate	377
387. Effect of décisions under this Act, and liability of holder of certificate thereunder	378
388. Investiture of inferior Courts with jurisdiction of District Court for purposes of this Act	378
389. Surrender of superseded and invalid certificates	379
390. Provisions with respect to certificates under Bombay Regulation VIII of 1827... ..	379

PART XI. MISCELLANEOUS.

391. Saving	380
392. Repeals	380

SCHEDULES.

SCHEDULE I.—Table of Consanguinity	381
SCHEDULE II.—	
Part I.—Order of next-of-kin in case of Parsi intestates referred to in section 55 (b)	382
Part II.—Order of next-of-kin in case of Parsi intestates referred to in section 56	382
SCHEDULE III.—Provisions of Part VI applicable to certain Wills and Codicils described in section 57	383
SCHEDULE IV.—Form of Certificate	384
SCHEDULE V.—Form of Caveat	384
SCHEDULE VI.—Form of Probate	384
SCHEDULE VII.—Form of Letters of Administration	385
SCHEDULE VIII.—Forms of Certificate and Extended Certificate	385
SCHEDULE IX.—Enactments Repealed	387

APPENDICES.

APPENDIX I.—On Probate Duty :—	
I. Probate Duty in case of Probate and Letters of Administration	388
II. Probate Duty in case of Certificate under the Succession Certificate Act (now under Part X of this Act)	394
APPENDIX II.—Act No. XV of 1916—The Hindu Deposition of	404
Madras Act No. I	406
Act No. VIII of	
Madras) Act	407
APPENDIX III.—Act No. XII of 1855	409
Act No. XIII of 1855	410
APPENDIX IV.—Married Women's Property Act	412
APPENDIX V.—Administration of Estates Regulation, 1827	416
GENERAL INDEX	423

TABLE OF CASES.

A

Aba Satar, In re, 55.
 Abbott v. Middleton, 81.
 Abbu v. Kuppammal, 80.
 Abdool Aziz, In the goods of, 392.
 Abdul Karim v. Abdul Qayum, 102.
 Abdul Karim v. Karmali, 236.
 Abdul Karim v. Maqbul-un-Nissa, 239.
 Abdul Rahiman v. Kuti Ahmed, 230.
 Abbiram v. Gopal Das, 290, 305, 313.
 Abraham v. Abraham, 3, 4.
 Abrahams, In re, Abrahams v. Bendon, 355.
 Abram v. Cunningham, 312.
 Achutan v. Cheriotti, 368.
 Achyutananda v. Jagannath, 234.
 Ackerley v. Oldham, 260.
 Adams and Kensington Vestry, In re, 184.
 Aditram v. Bapulal, 66.
 Adm.-General v. A. D. Christian, 353.
 Adm.-General v. Ananda Chari, 4, 30.
 Adm.-General v. Apcar, 182.
 Adm.-General v. Hawkins, 337.
 Adm.-General v. Hughes, 146, 346.
 Adm.-General v. Kristo, 336.
 Adm.-General v. Lalit Mohan, 237.
 Adm.-General v. Lazar, 61, 122, 184.
 Adm.-General v. Money, 85, 107, 182, 207.
 Adm.-General v. Premlal, 232, 255, 291, 314, 315.
 Adm.-General v. Simpson, 22, 146.
 Adm.-General v. White, 112, 113.
 Adv.-General v. Belchambers, 149, 150.
 Adv.-General v. Pardonji, 150.
 Adv.-General v. Hormusji, 89, 90, 91, 92, 149.
 Adv.-General v. Jumbhai, 46, 55, 92, 93.
 Adv.-General v. Karmali, 125, 129.
 Adv.-General v. Strangman, 149.
 Adv.-General v. Surnomoyee, 3.
 Adv.-General v. S Webb-Johnson, 150.
 Adv.-General v. Vishvanath, 147.
 Adv.-General v. Vithaldas, 93, 136.
 Aga Mahomed v. Koolson Bee Bee, 323.
 Agnew v. Belfast Banking Co., 220.
 Agnew v. Mathews, 126, 209.
 Ahmayee v. Yalumlal, 53.

A—contd.

Ajudhia Buksh v. Musamut Rukun Kuar, 154.
 Alaguppa v. Mangathai, 41.
 Alamelemmall v. Suryaprakasaraaya, 234.
 All Souls College v. Coddington, 93.
 Allah Dad v. Sant Ram, 374.
 Allan v. Morrison, 66.
 Allangamanjori v. Sonamoni, 131, 135.
 Allen v. Dundas, 257, 312.
 Allen v. Maddock, 56, 57.
 Allen v. McPherson, 47, 48, 257.
 Amarendra Nath v. Kashi Nath, 52, 53, 54.
 Amarendra v. Shuradhani, 73.
 Ambalal v. Bai Rewa, 102.
 Ambica v. Mukta, 339.
 Ambika Charan v. Srimoti, 204.
 Amerchand Madhovi, Ex-parte, 314.
 Amanna v. Gurumurthi, 239.
 Ammuni v. Krishna, 375.
 Amrito v. Surnomoye, 145, 332.
 Amulya v. Kali Das, 232.
 Amyot v. Dwaris, 94.
 Anandrao v. Adm.-General, 178, 179, 185, 207.
 Anantha v. Nagamuthu, 169.
 Anderson v. Anderson, 61.
 Andrew v. Joakim, 147.
 Andrews v. Partington, 127.
 Andrews re, 221.
 Anilabala v. Rajendranath, 294, 361.
 Annada Charan v. Atul Chandra, 288.
 Annamalal v. Malayandi, 306.
 Annapurna v. Nalini, 238, 239.
 Annapurnabai v. Lakshman, 375.
 Annoda v. Kalikrishna, 284, 286.
 Annapurna Dasi v. Kallayani Dasi, 278.
 Antao v. Ardeshir, 3, 99.
 Antony v. Makis, 246, 325.
 Anwar Hoosein v. Secretary of State, 66, 268.
 Appacooty v. Muthu, 250.
 Arakal v. Domingo, 121.
 Arakal v. Narayana, 291.
 Archibald v. Wright, 183.
 Ariya v. Thangammal, 376.
 Arthar Boston Rockley, Estate of, 247, 253.

A—*contd.*

- Arthur Gerald Norton Knight, In the matter of, 309.
 Arumugam v. Anmi Ammal, 106, 111, 209.
 Arumugam v. Valuba, 239.
 Arunachalam v. Mathu, 239.
 Arunmoyi v. Mohendra, 238.
 Ashburner v. Maguire, 197.
 Ashburner v. Wilson, 79, 94.
 Ashford, In re, 134.
 Ashrafi v. Bidya Prasad, 73.
 Ashutosh v. Doorga Churn, 109, 116, 148.
 Asiatic Banking Corporation v. Amador Yiegas, 337, 339.
 Astley v. The Earl of Essex, 180.
 Astor, In the goods of, 259.
 Atkins v. Hiscocks, 155.
 Atkinson v. Morris, 268.
 Attenborough v. Solomon, 323.
 Attorney-General v. Brackenbury, 96.
 Attorney-General v. Holbrook, 344.
 Atul Krishna v. Sanyasi, 86.
 Aulia Bibi v. Allauddin, 55.
 Austen v. Halsey, 173.
 Arabai v. Pestonjee, 52.
 Avdall, In the goods of, 303.
 Avelyn v. Ward, 174.
 Avern v. Lloyd, 106.
 Ayliff v. Ayliff, 286.
 Ayshabai v. Ebrahim, 261, 316, 317.
 Aziz-un-Nissa v. Tassadduq, 106.
 Azmal Ali v. Sitla Bux, 374.

B

- Bachman v. Bachman, 119.
 Bacon v. Simpson, 256.
 Bacon's Will, Re, 85.
 Bai Devkore v. Lachand, 376.
 Bai Gulab v. Thakorelal, 41, 45.
 Bai Harkor v. Maniklal, 232.
 Bai Jaiji v. Macleod, 346.
 Bai Nandkore v. Sha Maganlal, 376.
 Balabhai v. Motabhai, 131, 139.
 Balakrishnu v. Narayanasawmy, 234, 237.
 Balamba v. Krishnayya, 19.
 Bal Gangadhar Tilak v. ————, 284, 285, 286.
 Balkrishna v. Gopikaba, ————.
 Ball v. Ball, 340.
 Ballin v. Ballin, 89, 162.

B—*contd.*

- Balmakund v. Kundan, 368, 371.
 Balmukund v. Bhagvandas, 54.
 Bancharam v. Adya Nath, 238.
 Bandairs v. Richardson, 48.
 Bank of Bombay v. Ambalal, 235.
 Bank of Bombay v. Suleman Somji, 324.
 Bankin Bihari v. Srimati Matangini, 54.
 Banks v. Goodfellow, 42.
 Bapi v. Jamnadas, 92.
 Bapuji v. Haji Esmail, 95.
 Bapuji v. Jagannath, 55.
 Barada v. Gajendra, 346, 362.
 Barada Proshad v. Gajendra Nath, 330.
 Barber v. Barber, 108.
 Barber, Ex-parte, 88.
 Barber, Re, 329.
 Barker v. Barker, 365.
 Barlow v. Grant, 181.
 Barlow v. Orde, 112.
 Barot Parshotam v. Bai Muli, 247, 257, 258.
 Barry v. Butlin, 8, 49.
 Basan v. Brandon, 200.
 Basanta Kumar v. Gopal Chunder, 237.
 Basunta v. Parbati, 371.
 Bateman v. Pennington, 7.
 Bayabai v. Haridas, 186.
 Bayes v. Cook, 96.
 Baylis v. Att.-Gen., 84, 85.
 Beavan, in the goods of, 68.
 Bedell v. Constable, 255.
 Beer Pertab v. Rajendra Pertab, 45.
 Behary Lal v. Juggo Mohun, 247, 281.
 Belchier, Ex-parte, 363.
 Bell v. Fothergill, 66.
 Benode Behari v. Nistarini, 107, 145, 149.
 Bentinck v. Duke of Portland, 141.
 Bepin Behari v. Manoda Dasi, 288.
 Berry v. Gibbons, 324.
 Bescoby v. Pack, 88.
 Beyfus v. Lawley, 361.
 Bhagabati v. Kali Charan, 71, 98, 142, 158.
 Bhagirthibai v. Vishwanath, 40, 44.
 Bhagubai v. Appaji, 60.
 Bhagvanlal v. Bai Divali, 45.
 Bhagvansangh v. Becharadas, 234, 235.
 Bhagwarp v. Kula, 55.
 Bhagwankar v. Bose, 3.
 Bhaurao v. Lakshmibai, 13, 259, 260, 296.
 Bheema Deo v. Behari Das, 7.

C—contd.

Cartwright v. Cartwright, 42, 44.
 Cassibai v. Ransordas, 323.
 Cassidy, In the goods of, 270.
 Catherwood v. Chabaud, 281.
 Cattell, In re, Cattell v. Cattell, 145.
 Cawasji N. Pochkhanawalla v. R. D. Setna, 137, 147.
 Chadunbai v. Dady, 91, 92, 148.
 Chalmers, W. G., In the goods of, 393.
 Chamberlain, In the goods of, 287.
 Chamberlayne v. Brockett, 150.
 Chandanmal v. Vishvanath, 73.
 Chand Charan v. Haribola, 92.
 Chandmal v. Lachmi, 6, 247.
 Chandra v. Prasanna, 165, 234, 237, 285, 335.
 Chapman v. Brown, 116.
 Chapman v. Chapman, 116.
 Chapman v. Perking, 173.
 Charlton v. Durham, 331.
 Charter v. Charter, 75, 84.
 Chaston, Re, 159.
 Chauncey v. Graydon, 160, 173.
 Cheda Lal v. Gobind Ram, 87.
 Cheese v. Lovejoy, 64, 66.
 Chelikani v. Chelikani, 65, 66.
 Chesham, Re Lord, Cavendish v. Dacre, 216.
 Cheyney v. Smith, 344.
 Chidambara v. Krishnasami, 231, 234, 235, 241, 330, 331, 338, 363.
 Chimanrao v. Rambhaw, 169, 342.
 Chinniram v. Hanmenta, 238.
 Chinnam v. Tadiconda, 190, 195, 341, 353.
 Chinnasami v. Hariharabadra, 257, 258.
 Chintanman v. Ramchandra, 247, 257, 258.
 Cholmondeley v. Lord Ashburton, 99.
 Chotalal v. Kabubai, 294, 305, 306, 311.
 Chotay Lall v. Chunnoo Lall, 3.
 Chotey Narsim v. Ratan Koer, 44, 55.
 Christian v. Devereux, 187.
 Christopherson v. Naylor, 104.
 Chullan Singh v. Madho Singh, 363.
 Chundramoney v. Motilal, 110.
 Chunilal v. Bai Mulji, 73, 74, 159, 161.
 Chunilal v. Bhogilal, 182.
 Chunilal v. Osmond, 237, 316.
 Chunilal v. Samrath, 165, 176.
 Churchill v. Hobson, 365.
 Clark v. Clark, 330.
 Clarke v. Parker, 173.
 Clarke v. Scripps, 65.
 Clarke v. Robinson, 329.
 Clay v. Pennington, 106.

C—contd.

Cleare v. Cleare, 44.
 Clement v. Cheesman, 222.
 Clough v. Bond, 362.
 Cole v. Miles, 344.
 Cole v. Scott, 93.
 Coleman v. Seymour, 97, 98.
 Colgan v. Adm.-General, 147, 159, 166.
 Collector of Ahmedabad v. Savchand, 232, 393, 398.
 Collector of Kaira v. Chunilal, 393.
 Collector of Maldah v. Nirode Kamini, 393.
 Collector, Re, reference by, 6.
 Colleton v. Garth, 201.
 Collins v. Elstone, 77.
 Collison, Re, Collison v. Barber, 158.
 Comiskey v. Bowring-Henbury, 184.
 Concha v. Concha, 257, 258.
 Coode, In the goods of, 259.
 Cooke v. Wagster, 87.
 Cook v. Oakley, 117.
 Coombs v. Coombs, 244.
 Cooper v. Bockett, 54.
 Cooper v. Cooper, 117, 215.
 Cooper v. Thornton, 351.
 Cope, Re, 272.
 Corporation of Gloucester v. Osborn, 184.
 Corsellis, Re, 329.
 Cory, W. J., Re, 366.
 Cosnahan, In the goods of, 259.
 Coulter's case, 317.
 Courjon, In the goods of, 249, 335.
 Courtier, In re, Courtier v. Shea, 157.
 Courtier v. Oram, 141.
 Court of Wards v. Venkata, 80.
 Cowar Suttia Krishna, In the goods of, 279, 280.
 Cawasji Beramji, In re, 41.
 Cowis D., In re, 362.
 Cradock v. Piper, 329.
 Craster v. Thomas, 312.
 Cray v. Willis, 344.
 Cresswell v. Cresswell, 61.
 Cresswell, Re, 160.
 Cringan, In re, 249.
 Crinivasammal v. Vijayammal, 8.
 Cripps v. Wolcott, 122, 164, 167.
 Croft v. Lyndsey, 364.
 Croker v. Marquis of Hertford, 57.
 Cromek v. Lumb, 162.
 Crommelin v. Crommelin, 172.
 Crone v. Odell, 97, 98.
 Crooke v. De Vandes, 121.
 Crossly v. Clare, 111.

C—*contd.*

- Crosthwaite v. Dean, 64.
 Cruse v. Barley, 156.
 Cursetjee v. Dadabhai, 310.
 Cursetjee P. Tarachand v. Rustamjee, 18, 19.
 Cutto v. Gilbert, 61.

D

- Da Costa, In re Clarke v. Church of England
 Collegiate School, 92, 149.
 Dabbs v. Chisman, 390.
 Dadabhoj v. Cowasji, 106.
 Dadachanji v. Ratanbai, 157.
 Dadds, In the goods of, 65.
 Dagree v. Pacotti, 4.
 Damodar v. Dayal, 317.
 Damodardas v. Dayabhai, 90, 102, 103.
 Daniell v. Daniell, 122.
 Darke, In the goods of, 348.
 Dashwood v. Peyton, 172.
 Dave v. Bai Parvati, 368, 369.
 Davidson v. Kumpston, 167.
 Davies v. Bush, 340.
 Davies v. Fisher, 157.
 Davies v. Wattier, 348.
 Davis v. Bennet, 116.
 Dawson v. Clarke, 185.
 Dawubai, In the matter of the will of, 300.
 Day v. Day, 206, 209.
 Dayabhai v. Chunilal, 74.
 Dayabhai v. Damodar, 247, 260, 293, 393.
 Dayle v. Blake, 363.
 Deakin, Re, 78.
 De la Farque, In the goods of, 308.
 De Rosaz, In the goods of, 85.
 De Silva v. De Silva, 276, 323, 324, 325.
 De Souza v. Secretary of State, 231, 255, 281.
 De Souza v. Vaz, 156.
 De Souza M. A. v. Ignacio, 335.
 Debendra v. Hemchandra, 365.
 Debendra v. Radhika, 327.
 Debendro Nath v. Administrator-General, 285,
 309, 310, 312, 323.
 Dekshayani v. Amrita, 137.
 Delaney v. Rohmat, 237.
 Delany v. Delany, 83.
 Denby, Re, 187.
 Depit v. Delerieleuso, 244.
 Desputty Singh, In re, 290, 291.
 Devshankar v. Motiram, 92.

D—*contd.*

- Dew v. Clark, 45.
 Dhanjeebhai v. Navajbai, 33.
 Dhanlaxmi v. Hariprasad, 109, 176.
 Dharmaya v. Sayana, 371.
 Dhondubai v. Laxmanrao, 80.
 Dias v. De Livera, 8, 127, 142.
 Dickinson v. Stidolph, 58.
 Digamber v. Narayen, 50, 266, 291.
 Dinamoni v. Elahadut Khan, 237.
 Dinbai v. Nusserwanji, 72, 99.
 Dimbai v. Pestonji, 147.
 Dines Chandra v. Biraj Kamini, 94, 129.
 Dingwell v. Askew, 202.
 Dinshaw v. Dinehaw, 96, 97.
 Din Tarini v. Krishna, 6, 7.
 Diwali v. Patel Bechardas, 109.
 Dix v. Burford, 344, 345.
 Dodgson, In the goods of, 276.
 Doe v. Clarke, 127.
 Doe v. Davies, 90.
 Doe v. Evans, 64.
 Doe v. Glann, 256.
 Doe v. Manifold, 53.
 Doe v. Moore, 166.
 Doe v. Perkes, 65.
 Doe d. Gill v. Pearson, 170.
 Doe d. M' Kenzie v. Pestonji, 100.
 Doe d. Thomas v. Banyon, 75.
 Dolphin v. Robins, 15.
 Doo v. Brabant, 120.
 Dorin v. Dorin, 112.
 Dormer v. Brnnet, 93.
 Dosa Manavale, In re, 393.
 Douglas v. Douglas, 93.
 Douglas Menzies v. Umphelley, 214.
 Dover v. Alexander, 112.
 Dowdeswell v. Dowdeswell, 276.
 Downward v. Dickinson, 244.
 Dows v. Gorton, 365.
 Drake v. Att-Genl, 392, 393.
 Drake v. Drake, 75, 81.
 Drakeford v. Drakeford, 107.
 Draupadi v. Rajkumari, 290.
 Drummond v. Parish, 59.
 Duane, In the goods of, 50.
 Dubois v. Trant, 286.
 Duffield v. Hicks, 222.
 Duffill v. Duffill, 154.
 Dufour v. Pereira, 8, 51.
 Dugdale, Re, 169, 170.
 Duke of Norfolk's case, 132.
 Dulhu Genda v. Harmandan, 44.

C—contd.

Cartwright v. Cartwright, 42, 44.
 Cassibai v. Ransordas, 323.
 Cassidy, In the goods of, 270.
 Catherwood v. Chabaud, 281.
 Cattell, In re, Cattell v. Cattell, 145.
 Cawasji N. Pochkhanawalla v. R. D. Setna,
 137, 147.
 Chadunbai v. Dady, 91, 92, 148.
 Chalmers, W. G., In the goods of, 393.
 Chamberlain, In the goods of, 287.
 Chamberlayne v. Brockett, 150.
 Chandanmal v. Vishvanath, 73.
 Chandi Charan v. Haribols, 92.
 Chandmal v. Lachmi, 6, 247.
 Chandra v. Prasanna, 165, 234, 237, 285, 335.
 Chapman v. Brown, 116.
 Chapman v. Chapman, 116.
 Chapman v. Perking, 173.
 Charlton v. Durham, 331.
 Charter v. Charter, 75, 84.
 Chauston, Re, 159.
 Chauncey v. Graydon, 160, 173.
 Cheda Lal v. Gobind Ram, 87.
 Cheese v. Lovejoy, 64, 66.
 Chelikani v. Chelikani, 65, 66.
 Chesham, Re Lord, Carendish v. Dacre, 216.
 Cheyney v. Smith, 344.
 Chidambara v. Krishnasami, 231, 234, 235, 241,
 330, 331, 338, 363.
 Chimanrao v. Rambhaw, 169, 342.
 Chinniram v. Hanuanta, 238.
 Chinnam v. Tadiconda, 190, 195, 341, 353.
 Chinnasami v. Hariharabhadra, 257, 258.
 Chintanman v. Ramchandra, 247, 257, 258.
 Cholmondeley v. Lord Ashburton, 99.
 Chotalal v. Kabubai, 294, 305, 306, 311.
 Chotsay Lal v. Chunnoo Lal, 3.
 Chotey Narain v. Ratan Koer, 44, 55.
 Christian v. Devereux, 187.
 Christopherson v. Naylor, 104.
 Chullan Singh v. Madho Singh, 368.
 Chundramoney v. Motilal, 110.
 Chunilal v. Bai Muli, 73, 74, 159, 161.
 Chunilal v. Bhogilal, 182.
 Chunilal v. Osmond, 237, 316.
 Chunilal v. Samrath, 165, 176.
 Churchill v. Hobson, 365.
 Clark v. Clark, 330.
 Clarke v. Parker, 173.
 Clarke v. Scripps, 65.
 Clarkson v. Robinson, 329.
 Clay v. Pennington, 106.

C—contd.

Cleare v. Cleare, 44.
 Clement v. Cheesman, 222.
 Clough v. Bond, 362.
 Cole v. Miles, 344.
 Cole v. Scott, 93.
 Coleman v. Seymour, 97, 98.
 Colgan v. Adm.-General, 147, 152, 166.
 Collector of Ahmedabad v. Sarchand, 232, 233,
 329.
 Collector of Kaira v. Chunilal, 323.
 Collector of Maljib v. Nirode Kamini, 321.
 Collector, Re, reference by, 6.
 Colleton v. Garth, 291.
 Collins v. Elstone, 77.
 Collison, Re, Collison v. Barber, 158.
 Comlakey v. Bowring-Henbury, 184.
 Concha v. Cunha, 237, 258.
 Coode, In the goods of, 259.
 Cooke v. Wagster, 87.
 Cook v. Oakley, 117.
 Coombs v. Coombs, 244.
 Cooper v. Bockett, 54.
 Cooper v. Cooper, 117, 215.
 Cooper v. Thornton, 351.
 Cope, Re, 272.
 Corporation of Gloucester v. Osborn, 184.
 Corsellis, Re, 329.
 Cory, W. J., Re, 366.
 Cosnahan, In the goods of, 259.
 Coulter's case, 317.
 Courjon, In the goods of, 249, 335.
 Courtier, In re, Courtier v. Shea, 157.
 Courtier v. Oram, 141.
 Court of Wards v. Venkata, 80.
 Cowar Suttia Krishna, In the goods of, 279, 280.
 Cowasji Beramji, In re, 41.
 Cowis D., In re, 362.
 Cradock v. Piper, 329.
 Craster v. Thomas, 312.
 Cray v. Willis, 344.
 Cresswell v. Cresswell, 61.
 Cresswell, Re, 160.
 Cringan, In re, 249.
 Crinivasammal v. Vijayammal, 8.
 Cripps v. Wolcott, 122, 164, 167.
 Croft v. Lyndsey, 364.
 Croker v. Marquis of Hertford, 57.
 Cromek v. Lumb, 162.
 Crommelin v. Crommelin, 172.
 Crone v. Odell, 97, 98.
 Crooke v. De Vandes, 121.
 Crossly v. Clare, 111.

C—contd.

- Crosthwaite v. Dean, 64.
 Cruse v. Barley, 156.
 Cursetjee v. Dadabhai, 310.
 Cursetjee P. Tarachand v. Rustamjee, 18, 19.
 Cutto v. Gilbert, 64.

D

- Da Costa, In re Clarke v. Church of England Collegiate School, 92, 149.
 Dabbs v. Chisman, 390.
 Dadabhoy v. Cowasji, 106.
 Dadachanji v. Ratanbai, 157.
 Dadds, In the goods of, 65.
 Dagree v. Pacotti, 4.
 Damodar v. Dayal, 317.
 Damodardas v. Dayabhai, 90, 102, 103.
 Daniell v. Daniell, 122.
 Darke, In the goods of, 348.
 Dashwood v. Peyton, 172.
 Dave v. Bai Parvati, 368, 369.
 Davidson v. Kimpton, 167.
 Davies v. Bush, 340.
 Davies v. Fisher, 157.
 Davies v. Wattier, 348.
 Davis v. Bennet, 116.
 Dawson v. Clarke, 185.
 Dawubai, In the matter of the will of, 300.
 Day v. Day, 206, 209.
 Dayabhai v. Chunilal, 74.
 Dayabhai v. Damodar, 247, 260, 293, 393.
 Dayle v. Blake, 363.
 Deakin, Re, 78.
 De la Farque, In the goods of, 308.
 De Rosaz, In the goods of, 85.
 De Silva v. De Silva, 276, 323, 324, 325.
 De Souza v. Secretary of State, 231, 255, 281.
 De Souza v. Vaz, 156.
 De Souza M. A. v. Ignacio, 335.
 Debendra v. Hemchandra, 365.
 Debendra v. Radhika, 327.
 Debendro Nath v. Administrator-General, 285, 309, 310, 312, 323.
 Dekshayani v. Amrita, 137.
 Delaney v. Rohmat, 237.
 Delany v. Delany, 88.
 Denby, Re, 187.
 Depit v. Delerieleuse, 244.
 Desputty Singh, In re, 290, 291.
 Devshankar v. Motiram, 92.

D—contd.

- Dew v. Clark, 45.
 Dhanjeebhai v. Navajbai, 33.
 Dhanlaxmi v. Hariprasad, 109, 176.
 Dharmaya v. Sayana, 371.
 Dhondubai v. Laxmanrao, 80.
 Dias v. De Livera, 8, 127, 142.
 Dickinson v. Stidolph, 58.
 Digamber v. Narayan, 50, 266, 291.
 Dinamani v. Elahadut Khan, 237.
 Dinbai v. Nusserwanji, 72, 99.
 Dinbai v. Pestonji, 147.
 Dines Chandra v. Biraj Kamini, 94, 129.
 Dingwell v. Askew, 202.
 Dinshaw v. Dinshaw, 96, 97.
 Din Tarini v. Krishna, 6, 7.
 Diwali v. Patel Bechardas, 109.
 Dix v. Burford, 344, 345.
 Dodgson, In the goods of, 276.
 Doe v. Clarke, 127.
 Doe v. Davies, 90.
 Doe v. Evans, 64.
 Doe v. Glann, 256.
 Doe v. Manifold, 53.
 Doe v. Moore, 166.
 Doe v. Perkes, 65.
 Doe d. Gill v. Pearson, 170.
 Doe d. M' Kenzie v. Pestonji, 100.
 Doe d. Thomas v. Benyon, 75.
 Dolphin v. Robins, 15.
 Doo v. Brabant, 120.
 Dorin v. Dorin, 112.
 Dormer v. Barnet, 93.
 Dosa Manavale, In re, 393.
 Douglas v. Douglas, 93.
 Douglas Menzies v. Umphelley, 214.
 Dover v. Alexander, 112.
 Dowdeswell v. Dowdeswell, 276.
 Downward v. Dickinson, 244.
 Dowse v. Gorton, 365.
 Drake v. Att.-Genl., 392, 393.
 Drake v. Drake, 75, 84.
 Drakeford v. Drakeford, 107.
 Draupadi v. Rajkumari, 290.
 Drummond v. Parish, 59.
 Duane, In the goods of, 50.
 Dubois v. Trant, 286.
 Duffield v. Hicks, 222.
 Duffill v. Duffill, 154.
 Dufour v. Pereira, 8, 51.
 Dugdale, Re, 169, 170.
 Duke of Norfolk's case, 132.
 Dulhin Genda v. Harmandan, 44.

D—contd.

- Dunne v. Byrne, 149.
 Durga Das v. Ishaan Chandra, 163.
 Durga Pershad v. Raghunandan, 175.
 Durrant v. Friend, 196.
 Dwarkanath v. Burroda Persaud, 116, 149.
 Dwijendra Nath v. Goloke Nath, 266, 284.

E

- Eames v. Haton, 258.
 Earnest v. Eustace, 244.
 East Indian Ry. v. Kalidas, 320.
 Eastern Mortgage and Agency Ltd. v. Reball
 Kumar Roy, 251, 326.
 Eaton v. Hewitt, 175.
 Edward v. Hall, 181.
 Edwards v. Edwards, 163.
 Edwards, re, Jones v. Jones, 166.
 Effie Jessie Caroline, Goods of, 6.
 Egerton v. Earl of Brownlow, 169.
 Ekrareshwar v. Janeshwari, 73.
 Elliott, In re, 15.
 Elliot v. Devenport, 119.
 Ellis v. Ellis, 312.
 Ellis v. Horston, 112.
 Ellokasse Dassee v. Durponarain, 160, 165.
 Elokeshi v. Hari Prosad, 266.
 Eracha v. Jerbai, 122.
 Euston (Earl of) v. Seymour, 59.
 Eva Mountatephens v. Hunter, 300, 313.
 Evans v. Jones, 117.
 Evans, Re, 366.
 Everett v. Everett, 88.
 Ewer v. Corbet, 323, 325.
 Ewer v. Halston, 77.
 Ewing v. Orr Ewing, 361.
 Ezekiel, In re, 231, 300, 392, 402.

F

- Fanindra v. Adm.-General, 116, 149.
 Fanindra v. Rajeshwar, 80.
 Fanny Deborah Meyer, In the estate of, 50.
 Fardunji M. Banaji v. Mithibai, 106, 139.
 Fardunji v. Navajbai, 276, 296.
 Farhall v. Farhall, 366.
 Farr v. Newman, 232.
 Farrer v. St. Catherine's Coll., 64.
 Fateh Chand v. Muhammad, 239.
 Fateh Chand v. Rup Chand, 73.

F—contd.

- Fatima v. Ahmed, 222.
 Fatima Bibi v. Sheikh Ahmed Daksh, 221.
 Fatma v. Shaik Essa, 233.
 Featherstone's Trusts, In re, 109.
 Fehrsen v. Simpson, 93.
 Fernandes v. Alves, 53.
 Fernie, In the goods of, 249.
 Ferrand v. Prentice, 318.
 Fielding v. Preston, 193.
 Fitz Patrick v. M'Glone, 312.
 Fitzwilliam v. Kelly, 193.
 Fleetwood, Re, 156.
 Ford v. Ward, 57.
 Forrachman, In the goods of, 392.
 Forrester v. Leigh, 190.
 Foster v. Bates, 246.
 Foster, In the goods of, 250.
 Framji D. Ghaswalla v. Adarji D. Ghaswalla,
 237, 246.
 Francis Ghosal v. Gabri Ghosal, 4, 121.
 Fraser, In the goods of, 66.
 Freeman v. Fairlie, 3.
 Frost, In re, 134.
 Fryer v. Rankin, 87.
 Fry v. Fry, 361.
 Fulford v. Hardy, 157.
 Fulton v. Andrews, 50.

G

- Gabriel v. Mordakai, 63.
 Gajadhar v. Megha, 223, 230.
 Ganapathi v. Siva Malai, 232, 236, 321, 325.
 Ganesh v. Ramchandra, 257.
 Gangabai v. Bhagwandas, 49, 50, 57, 61, 322.
 Gangabai v. Thavar Mulla, 91, 93.
 Gungamoyi v. Trolluckhya, 54.
 Ganjessar Koer v. Collector of Patna, 247.
 Ganoda Sundary v. Nalini Rajan, 335, 360.
 Garabini v. Pratap Chandra, 291.
 Gardinar v. Parker, 222.
 Gardner, Re, 187.
 Garland, Ex-parte, 366.
 Garham In re, Taylor v. Baker, 135.
 Gauri v. Ouyadin, 374.
 George, In the goods of, 393.
 Georges v. Georges, 269.
 Gerindra v. Rajeswari, 283.
 Ghafar Khan v. Kalandari, 239.
 Gheethabai v. Nandubai, 258, 291.
 Gibson v. Bott, 355.
 Giles v. Giles, 78.

G—contd.

Gilliat v. Gilliat, 247.
 Giribala v. Bijoy Krishna, 308.
 Giris Chandra Mitter, In the goods of, 281.
 Gittings v. Mc Dermott, 104, 119, 120.
 Gladstone, In the goods of, 392, 402.
 Gleadow v. Atkin, 364.
 Glynn v. Oglander, 7.
 Gnanamuthu v. Vana Koilpillai, 304.
 Gnanendra v. Surendra, 100.
 Gobinda Chandra, Re, 287.
 Gobinda, In the goods of, 291.
 Goculdas v. Parshotamdas 55, 248, 285, 286.
 Goculdas v. Valibai, 318, 330.
 Gokool Nath v. Issur Lochun, 21, 93, 149.
 Gokul Chand v. Mangal Sen, 248.
 Golap Sundari Dassi, In the goods of, 262.
 Goodier v. Johnson, 141.
 Gooroodas v. Sarat Chunder, 73.
 Gopal Dass v. Budree Dass, 250, 312.
 Gopal Krishna v. Ramnath, 80, 84, 209.
 Gopal Lal Sett v. Purna Chandra, 148.
 Gopal Lal's Seal, In the goods of, 274.
 Gopessen Dutt, In the goods of, 50.
 Gopi Krishna v. Raj Krishna, 223, 224.
 Gopi v. Mussammat-Jaldhara, 109, 121.
 Gordhandas Soonderdas v. Ramcoover, 137, 142, 182, 234, 237.
 Gordhan Das v. Chuni Lal, 92.
 Gosavi Shivgar v. Rivett-Carnac, 145, 157.
 Goudoin v. Venkatesa, 19.
 Gour Chandra v. Sarat Sundari, 285, 286.
 Govindappah v. Kondappah, 238.
 Gowling v. Thompson, 105.
 Graham v. Londonderry, 19.
 Grant v. Dyer, 173.
 Grant v. Grant, 85.
 Grayburn v. Clarkson, 350.
 Green v. Marsden, 185.
 Green v. Pigot, 348.
 Green v. Smith, 205.
 Green v. Symonds, 201.
 Greender v. Mackintosh, 325.
 Greenwood v. Roberts, 141.
 Gregory v. Samuel, 95.
 Grey v. Charusila, 247, 249.
 Griffiths v. Hamilton, 257.
 Grimond v. Grimond, 93, 148.
 Grish Chander, v. Broughton, 232, 326.
 Grish Chander, In the goods of, 52, 279.
 Gryll's Trust, Re, 101.
 Guardhouse v. Blackburn, 50.
 Gubbhoy, In the goods of, 303.

G—contd.

Gulab v. Thakorlal, 41, 45.
 Gulabchand v. Moti, 369, 371.
 Gulam Husain v. Aji, 149.
 Gulbaji v. Rustomji, 103, 178.
 Gullan, In re 65.
 Gully v. Davies, 82.
 Gulraji v. Jugedeo, 372.
 Gulshan Ali v. Zakir Ali, 239.
 Gunga Bissen, In the goods of, 266.
 Gunga Bissen Mundra, In re, 284.
 Gunindra v. Jugmala, 367.
 Gurusami v. Sivakami, 73, 167.

H

Habergham v. Vincent, 7, 56.
 Hafizabai v. Kazi, 295, 314.
 Hagger v. Payne, 126.
 Haji Abdul v. Haji Hamid, 148.
 Haji Bibi v. H. H. Sir Sultan, 311.
 Haji Ismail, In re, 55, 396.
 Haji Mahomed Abba, In the Will of, 248, 268 300.
 Haji Mahomed Mitha v. Musaji Esaji, 236.
 Haji Saboo Sidick v. Ally Mahomed, 318.
 Hajon Manik v. Bur Singh, 14.
 Hale v. Hale, 141.
 Hale v. Takelove, 70.
 Haliburton v. Adm.-General, 182.
 Hall v. Christian, 187.
 Hall v. Hall, 48, 49.
 Hall, Re, 349.
 Hall v. Warren, 44.
 Hallett's Estate, Re, 365.
 Halston In re, Ewen v. Holston, 75.
 Halton v. Foster, 22, 99.
 Hamabai v. Bamanji, 249.
 Hammond v. Neame, 352.
 Hancock, In Re, Watson v. Watson, 183.
 Hancock v. Podmore, 33.
 Hand, In the Goods of, 87.
 Handley v. Stacey, 43.
 Hanson v. Graham, 156, 157.
 Hanwant v. Mithana, 239.
 Har Prasad v. Sukhdevi, 121.
 Hara Coomar v. Doorgamoni, 247, 253, 278, 286, 313.
 Hardwari v. Gomi, 41, 45.
 Hare Ram v. Ram Ram, 262.
 Hasendra Krishna Mukerjee, In the Goods of, 287.
 Harford v. Browning, 187.

H—*contd.*

Hari Chintaman v. Moro Lakshman, 8, 45.
 Hari Das v. Secretary of State, 73.
 Haribhusan v. Manmatha, 255, 265.
 Haridas v. Ramdas, 320.
 Harilal v. Bai Mani, 45, 250.
 Harilal v. Bai Rewa, 102.
 Harper, *In re*, Plouman v. Harper, 107.
 Harter v. Harter, 77, 80.
 Harriett, *In the goods of*, 392.
 Harris v. Brown, 78, 111, 154, 155.
 Harris v. Knight, 269.
 Harrison v. Asher, 196.
 Harrison v. Harrison, 79.
 Harrison, *Re*, 338.
 Harrison v. Rowley, 187.
 Harwood v. Baker, 39, 40, 42, 43.
 Hassanali v. Esmailjee, 330.
 Hassanali v. Popatlal, 211, 312.
 Hawkes v. Baldwin, 181.
 Hawkes v. Hawkes, 8.
 Hawson v. Shelley, 312.
 Hayes, *In re*, 59.
 Heath v. Dandy, 340.
 Heathe v. Heathe, 121.
 Hemangini v. Nobu Chand, 207.
 Hembota Dabee, *In re*, 52.
 Henderson, *In the Goods of*, 270.
 Hensler, *Re*, 123.
 Hensman v. Fryer, 190.
 Herbert v. Reid, 78.
 Heseltine v. Heseltine, 201.
 Heslop, *In the Goods of*, 286, 288.
 Hewitt v. Kays, 221, 222.
 Hicking v. Boyer, 205.
 Higgins v. Dawson, 75.
 Hill v. Adm.-General, 18.
 Hill v. Bird, 286.
 Hill v. Curtis, 319.
 Hill *Re*, 59.
 Hill v. Schwarz, 51.
 Hinchley v. Simmons, 8, 63.
 Hingeston v. Tucker, 290.
 Hippolite v. Stuart, 18.
 Hirabai v. Lakshmbai, 102, 121.
 Hirubhai v. Burjorji, 36.
 Hiscocks v. Hiscocks, 83.
 Hoath v. Hoath, 157.
 Hobson v. Blackburn, 8.
 Hoby v. Hoby, 43.
 Hodgson v. Halford, 169.
 Holland v. Kin, 256.
 Holloway v. Holloway, 100.
 Holmes v. Dring, 364.

H—*contd.*

Hood v. Oglander, 169.
 Hooley v. Hatton, 115.
 Hoorbai v. Solomon, 86.
 Hopkins v. Abbott, 87.
 Horendranarain v. Chandrakanta, 53, 56.
 Hormasji v. Dhanjabaw, 41, 50, 56, 219.
 Hormusjee P. Warden, *In the matter of*, 150.
 Hormusji v. Dadabhai, 170.
 Hormusji v. Dhanbaiji, 250, 257, 281.
 Horsford, *In the goods of*, 69.
 Hossainara v. Hahmannassa, 336.
 Hotilal v. Hardeo, 238.
 Houghton, *Re*, 363.
 Howarth v. Dewell, 183, 191.
 Howe v. Lord Dartmouth, 199, 350, 362.
 Howell, *In re*, Liggins v. Buckingham, 187.
 Hudleston v. Gouldsbury, 87.
 Hughes v. Empson, 350.
 Huguenin v. Baseley, 49.
 Humphrey v. Tayleur, 121.
 Humphreys v. Humphreys, 197.
 Hunt v. Hort, 85.
 Hunter, *In re*, C M 159, 161.
 Hurri Krishna v. Bal Bhadra, 271.
 Hurro Ball Shaha, *In the matter of petition of*, 265, 283, 290, 291.
 Hurro Sundari Dabia, *In re*, 53.
 Hurrolall *in re*, 257.
 Huseinbhai v. Ahmedbhai, 157.
 Hutchison and Tenant, *In re*, 100, 185.

I

Ibrahim v. Saiboo, 222.
 Ibrahim v. Ziaunnissa, 211.
 Hebeston, *Ex-parte*, 67.
 Iot v. Genge, 53, 54.
 Indar Kunwar v. Jaipal Kunwar, 83.
 Inderwick v. Tatchell, 127, 167.
 Indra Chandra, *In the goods of*, 327.
 Indubala v. Manmatha, 218.
 Indubala v. Panchumani, 291.
 Ingoldby v. Ingoldby, 58.
 Ingram v. Soutten, 163.
 Ishan Chunder, *In re*, 288, 304.
 Ishur Chunder v. Doyamoye, 268.
 Ivory, *Re*, 258.

J

Jackson v. Hamilton, 91.
 Jackson *In re*, 103.

J—contd.

Jackson v. Jackson, 63, 155.
 Jacomb v. Harwood, 331, 364.
 Jagan Nath v. Bageshwar, 239.
 Jaganath v. Runjit, 258.
 Jagat Bijoy v. Tomijuddi, 165.
 Jageshwar Narain Deo v. Ramchandra Dutt, 121.
 Jagger v. Jagger, 145.
 Jagjivandas v. Brijdas, 212.
 Jagobandhu v. Dwarika, 323, 324.
 Jagrani v. Kuar Durga, 44.
 Jai Dei v. Banwari Lal, 372.
 Jai Narain v. Ujagar Lal, 149.
 Jaivee v. Macleod, 93.
 Jairam v. Kessowjee, 89, 117.
 Jairam v. Kuverbai, 121, 342.
 Jaineshwari v. Ugreshwari, 48.
 Jalbhai A. Sett v. Louis Manoel, 3.
 James, In the Goods of, 65.
 James Raley, In the goods of, 402.
 Jamnabai v. Dharsey, 92, 145.
 Jamnabai v. Hastubai, 368.
 Jamnabai v. Khimji, 149.
 Jamna Das v. Ramautar, 103.
 Jameetji v. Hirjibhai, 237, 285, 365.
 Jamshedji C. Tarachand v. Soonabai, 147.
 Janki v. Dhanu, 234, 237.
 Janki v. Kallu, 368.
 Jarat Kumari v. Bissessur, 40, 43, 50, 305.
 Jarvis v. Pound, 105.
 Javerbai v. Kahlbhai, 98, 136, 139.
 Javermal v. The Nazir of the D. C. of Poona, 377.
 Jeans, Re, Upton v. Jeans, 110.
 Jee v. Audley, 134.
 Jehangir R. Divecha v. Bai Kukibai, 253, 335.
 Jehangir v. Kaikhusru, 164, 165, 181.
 Jehangir v. Pirojbai, 35.
 Jenner v. Turner, 169.
 Jessop, Re, 116.
 Jetha Padamsi, In re, 335.
 Jethabhai v. Chotalal, 323, 366.
 Jethabhai v. Parshotam, 9.
 Jitendra v. Nritya, 93.
 Jitu Lal v. Binda Bibi, 124.
 Jnanendra Nath, goods of, 3.
 Jogadendra v. Hemanta, 148.
 Jogendra v. Atindra, 274.
 Jogendranarain v. Emily Temple, 318.
 Jogeshwar v. Ram Chandra, 103, 121.
 John Patterson, goods of, 284.

J—contd.

Johnson v. Johnson, 122, 123.
 Johnson v. Madras Railway Co., 320.
 Johnson v. Mills, 348.
 Johnson, In re, 366.
 Johnston v. Rowland, 185.
 Johnstone's Settlement, Re, 202.
 Jones v. Adm.-General, 136.
 Jones v. Westcombe, 175.
 Jones, In re, Peak v. Jones, 338.
 Jordan's Trust Re, 105.
 Joseph Vathia, Re, 4.
 Joy v. Camhbell, 364.
 Jubber v. Jubber, 91.
 Juggodishari Dabi, In re, 307.
 Jugmohundas v. Pallonjee, 232, 323, 327.

K

Kadar Nath v. Sarojini, 7, 65, 268.
 Kakikhya v. Hari Chavan, 326.
 Kal Krishna v. Makhan Lal, 148, 265.
 Kalee Tara v. Nobin Chunder, 294.
 Kali Charan v. Ramchandra, 186.
 Kali Das v. Ishan Chunder, 289, 304.
 Kalian Singh v. Ram Charan, 238.
 Kalidas v. Bai Mahali, 368.
 Kalumuddin v. Meharui, 310, 327.
 Kally Nath v. Chunder Nath, 155.
 Kalyanchand v. Sitabai, 257.
 Kamarazu v. Venkataratnam, 103.
 Kamarzu v. Venkataratnam, 103.
 Kamawati v. Digbaji, 4.
 Kamineymoney, Goods of, 278.
 Kanchan v. Baij Nath, 239.
 Kandhya Lal v. Manki, 309.
 Kanhai Rout v. Jogendra, 266, 284.
 Kanhaiya Lal v. Munni, 237.
 Kanji v. Adv.-General, 150.
 Kanti Chandra v. Kristo Churn, 326.
 Karam Ali v. Halima, 238.
 Karamsi v. Karasondas, 80.
 Karsendae v. Ladvavahu, 80.
 Kartik Mandal v. Bama Charan, 73.
 Kashi Chundra v. Gopi Krishna, 287, 290, 304.
 Kashi v. Parbhu, 239, 368, 371.
 Kashiba v. Shripat, 15.
 Kashinath v. Chinnayee, 139.
 Kashinath v. Gouravabai, 393.
 Kasarji v. Bai Dinbai, 260, 261, 263.
 Kedarnath v. Atul Krishna, 92, 149.
 Kedar Nath v. Sarojini, 65, 247.

K—contd.

Keen v. Keen, 65.
 Kellett v. Kellett, 181, 183.
 Kelly v. Powlett, 88.
 Kennell v. Abbott, 78.
 Ker v. Meakin, 67, 69.
 Kerwick v. Kerwick, 33.
 Keshavlal v. Collector of Ahmedabad, 235, 293.
 Khagendra v. Khetra Nath, 342.
 Khas Mahal v. Adv.-General, 49.
 Khaw Sim Tek v. Chuah Ghoh, 237.
 Kherodemoney Dossee v. Doorgamoney
 Dossee, 109, 142.
 Khetter Mohan v. Ganga Narain, 100.
 Khettramoni v. Shyama Churn, 288, 291, 313.
 Khumji v. Morarjee, 142.
 Kherodemoney v. Doorgamoney, 232.
 Khitish Chandra v. Osmond, 275.
 Khitish Chandra v. Radhika, 274, 316, 318.
 Khub Singh v. Ramji Lal, 80.
 Khushrobbhai v. Hormazaha, 335, 363.
 Kidd, Re, 366.
 King v. Bennett, 79.
 King v. Cleveland, 101.
 King v. Withers, 160.
 Kingsbury v. Walter, 108, 140.
 Kinside v. Harrison, 43.
 Kipping v. Ash, 290.
 Kipping, In re, Kipping v. Kipping, 126, 161.
 Kirk, Ex-parte, re, Bennett, 88.
 Kirkman v. Booth, 366.
 Kirkpatrick v. Kirkpatrick, 80.
 Kishen Dei v. Satyandra Nath, 290, 291.
 Kishori v. Mundra, 109.
 Knight v. Gould, 108.
 Knight v. Knight, 157.
 Knight, In re, 94.
 Knight's Trusts, Re, 363.
 Komola Kant Brewas, In re, 7.
 Komolothun v. Nilruttun, 257, 284, 287, 291.
 Koonjebhai v. Premchand, 102.
 Kothandarama v. Jagathambal, 225.
 Krishna v. Corporation of Calcutta, 320.
 Krishna v. Panchuram, 235, 293.
 Krishna v. Raghunandan, 402.
 Krishna v. Rai Mohun, 293.
 Krishna Nath v. Atmaram, 107, 109, 131, 141.
 Krishnama v. Venkammah, 248, 272, 369.
 Krishnamachariar v. Krishnamachariar, 41.
 Krishnarao v. Benabai, 83, 89, 109, 110, 145.
 Krishnarao v. Bhagwantrao, 45.
 Krishnasami v. Muthukrishna, 230.
 Kristoromoni v. Narendra, 138.
 Kulada Prasad v. Haripada Chatterjee, 4.

K—contd.

Kumar Chandra v. Prasanna, 164, 173.
 Kumarsami v. Subbaraya, 185.
 Kumud v. Rai Jatindra, 368.
 Kumud Krishna v. Jogendra, 165.
 Kunja Lal v. Kailash Chandra, 288, 304.
 Kunthalammal v. Suryaprakasroya, 116.
 Kuppayammal v. Ammani, 249, 309.
 Kusum Kumari v. Satish Chandra, 40.

L

Labouchere v. Tupper, 365.
 Lachho Bibi v. Gopi Narain, 50.
 Lachmandas v. Chater, 310.
 Lachmi Narain v. Wilayti Begam, 163.
 Lakhi Narain v. Multan Chand, 288, 291, 313.
 Lakhmichand v. Jas Kuvarbal, 328, 366.
 Lakshammamma v. Ratnamma, 108, 234, 342.
 Lakshmi Narain v. Nanda Rani, 327.
 Lakshmiiah v. Kanthandarama, 212.
 Lakshmilal v. Ganpat, 72, 121.
 Lakshmilal, In re, 315.
 Lakshminarayana Ammal, In re, 361, 392.
 Lakshminanker v. Vajrath, 45, 149.
 Lal Gajendra v. Lal Mathura, 73.
 Lala Rampawan v. Dal Koer, 73, 101, 164.
 Lalbhai v. Mansukh, 73.
 Lalchand v. Gomtibai, 232.
 Lali v. Murlidhar, 80.
 Lalit Chandra v. Baikantha, 302.
 Lalit Mohun v. Chukhun, 72, 73, 178.
 Lalit Mohun v. Navadip, 291.
 Lalit Mohan v. Radharam, 258.
 Lallu v. Jagmohan, 153, 161.
 Lallubhai v. Mankuverbai, 232.
 Lalita Prasad v. Salig Ram, 77, 80.
 Lambell v. Lambell, 66.
 Lambert v. Thwaites, 97.
 Lamb v. Eames, 184.
 Lampier v. Buck, 141.
 Lane v. Green, 79.
 Lane, Re, 197.
 Lang v. Pugh, 81.
 Langston v. Langston, 89.
 Lashbrook v. Cock, 121.
 Lassence v. Tierney, 181, 183.
 Lastings v. Gonsalves, 4.
 Law v. Thorpe, 106.
 Lawson v. Stitch, 192.
 Lay, In the goods of, 59.
 Leake v. Robinson, 109, 140, 162.
 Leckie, In the goods of, 270.
 Leeming v. Sherratt, 126.

L—contd.

Leeming, In re, Turner v. Leeming, 202.
 Lees v. Sanderson, 365.
 Lester v. Garland, 172.
 Letitia Lovegrove, In the goods of, 9.
 Lewin v. Lewin, 340.
 Lewis v. Lewis, 52.
 Lewis v. Mathews, 187.
 Lewis, In the goods of, 65.
 Lewis, Re, 180, 181.
 Lighton, In the goods of, 250.
 Limji N. Banaji v. Bapuji, 147.
 Lincoln v. Wright, 363, 365.
 Lister v. Tidd, 111.
 Littleton v. Cross, 338.
 Lloyd v. Webb, 157, 169, 328.
 Lockhart v. Hardy, 181.
 Lodwing v. Evans, 126.
 Loffus v. Maw, 51.
 Lomax v. Holmden, 79.
 Lonachand v. Uttamchand, 367, 371.
 Long v. Short, 190.
 Long v. Symes, 260.
 Long v. Watkinson, 101.
 Longbottom v. Satoor, 151.
 Lopez v. Lopez, 3.
 Lord Advocate v. Bogie, 101.
 Loveday, Goods of, 286.
 Low v. Guthrie, 50.
 Lowndes v. Lowndes, 354.
 Lucas v. Carline, 158.
 Lucas v. Lucas, 313, 376.
 Lucena v. Lucena, 167.
 Luchman Bharti v. Dukharan, 293.
 Lugar v. Harman, 109.
 Lyell v. Gauga, 320.
 Lyon v. Baker, 329.
 Lyttleton v. Cross, 338.

M

Ma Yait v. Maung Chit, 3.
 Macdonald, Re, 331.
 Machu, Re, 175.
 Mackenzie v. Edward, 15.
 Mackenzie v. Mackenzie, 101.
 Mackenzie, In the estate of, 15.
 Mackintosh v. Barber, 330.
 Macleay, In re, 170.
 McCormick v. Grogan, 185.
 Mc. Intyre D., In the goods of, 56.
 Mc. Murdo, In the goods of, 59.
 Macleod v. Sorabjee, 346, 360.
 McLeod v. Drummond, 323, 325.

M—contd.

Maddan Mohun v. Kali Churn, 291.
 Maddison v. Alderson, 51.
 Maden v. Taylor, 167.
 Madhavrao v. Maneklal, 272, 273, 274.
 Madras Doveton Trust Fund, In re, 315.
 Mafutlal v. Kanialal, 182.
 Magaluri v. Narayana, 316.
 Mahadeo, In re, 369.
 Mahamedbhai v. Bai Havabai, 222, 223.
 Maharajah Pertab Narain Singh v. Maharanees
 Subhao Koer, 65, 66.
 Mahim Chandra v. Hara Kumari, 98, 102, 103.
 Mahomed v. Khatubai, 16.
 Mahomed v. Shewkram, 102.
 Mahomed Shah v. Official Trustees, 131.
 Maitland v. Adair, 119.
 Makhan Lall, In the Goods of, 244.
 Makhun Brahmanee, In re, 262.
 Malappa v. Devi, 231, 241.
 Malcolm Gasper, In re, 393.
 Mamubai v. Dossa Moraji, 109, 121.
 Manasing v. Amad Kunhu, 237, 245, 375.
 Mancharam v. Kalidas, 375.
 Mancherji v. Mithibai, 35.
 Mancherji v. Narayan, 55.
 Manchha v. Ganga, 296.
 Maneckbai v. Manekji, 288, 304.
 Maneckbai v. Meherbai, 34.
 Mangaldas v. Ranchoddas, 215.
 Mangaldas v. Tribhovandas, 142.
 Mangaldas Nathubhai v. Krishnabai, 45.
 Manick Lal Seal, In Goods of, 249, 262.
 Manickbai v. Hormasji, 53, 54.
 Manikya Mala v. Nanda Kumar, 164.
 Mann, In re, Ford v. Ward, 87.
 Manning v. Purcell, 87.
 Mannox v. Greener, 207.
 Manohur Mukerjee v. Kasiwar Mukerjee, 164,
 165.
 Manorama v. Kali charan, 92, 98, 116, 149.
 Manorama v. Shiva Sundari, 284, 304.
 Mantel and Mantel, Re, 18.
 Manuel v. Jnana, 186, 316.
 March, Re, 121.
 Mariam Begum v. Wazir Begum, 111.
 Mariambai v. Hasam, 248.
 Marie Penheiro v. Jotendra, 344.
 Marry v. George, 72, 73.
 Marsh v. Marsh, 279.
 Martin v. Martin, 156.
 Mary Hemming, In the goods of, 261, 325.
 Maseyk v. Fergusson, 126, 138.
 Mason v. Baker, 169.

M—contd.

- Masonic & General Life Assurance Co., *Re*, 256.
 Matangini v. Chooneymoney, 237, 297.
 Mathias, In the goods of, 57.
 May v. Bennett, 348.
 Maybery v. Brooking, 88.
 Mayhew v. Newstead, 265.
 Mayne v. Mayne, 87.
 Mayor D' Lyons v. East India Company, 2, 40, 146, 147.
 Mayor of Lyons v. Advocate General, 150.
 Mazhar Husen v. Bodha Bibi, 43.
 Mead v. Orrery, 323.
 Mead, B., 222.
 Meherbai v. Maganchand, 232, 338.
 Meek, Mrs. E. E., In the goods of, 393.
 Melhuish v. Milton, 78.
 Mendham v. Williams, 158.
 Menzies v. Pulbrook, 232, 290.
 Mercer v. Hall, 172.
 Merrill v. Morton, 85.
 Metcalfe, In the goods of, 269.
 Mette v. Mette, 63.
 Metham v. Duke of Devonshire, 113.
 Metters v. Brown, 257.
 Middleton v. Dodswell, 315.
 Middleton's Case, 256.
 Midgley v. Midgley, 364.
 Miller v. Adm.-General, 18.
 Miller v. Travers, 83, 84.
 Miller v. Warren, 120.
 Mills v. Brown, 193.
 Minakshi v. Viswanatha, 8, 9.
 Minors v. Battison, 159.
 Mir Ibrahim v. Ziaulnissa, 231, 368.
 Mirza Kurratulain v. Pearsa Sahib, 233, 258, 297.
 Mithibai v. Canji, 249, 250.
 Mithibai v. Lami N. Banaji, 99, 139.
 Mithibai v. Meherbai, 73.
 Miyappa v. Supramania, 231.
 Moffat v. Burnie, 209.
 Mohamed v. Sarifan, 239.
 Mohar Singh v. Het Singh, 149.
 Mohendra v. Kali Porshad, 320.
 Mohendra Narain Roy, In the goods of, 287, 314.
 Mohesh Chandra v. Biswa Nath, 335.
 Mohesh Lal v. Busunt Kumaree, 337, 338.
 Mohun Dass v. Lutchmun Dass, 286.
 Moli, In re, Warren v. Moli, 177.
 Mokoondu v. Gonesh Chunder, 182.
 Mokshadayini v. Karnadhar, 288, 290, 291.

M—contd.

- Monmohinee v. Khetter, 376.
 Monmohini v. Banga Chandra, 235.
 Monnex v. Greener, 207.
 Monorama v. Kali Charan.
 Moore v. Frowd, 329.
 Moore v. King, 51.
 Moore, *Re*, 279.
 Moses Haji v. Haji Abdul, 249, 251.
 Moosabhai v. Yacobbhai, 56.
 Morarij v. Nentai, 92, 149.
 Morgan v. Boys, 42.
 Morgan, *Re*, 324.
 Morice v. Bishop of Durham, 91, 147, 148.
 Morrison v. Adm.-General, 49.
 Morley v. Loughman, 48.
 Morrell v. Giesse, 167.
 Morrell v. Morrell, 59, 77, 80, 279.
 Moss v. Cooper, 186.
 Motibai v. Karandas, 261, 262, 263.
 Motilal v. Adm.-General, 73.
 Motilal v. Harnarayan, 320.
 Motilahu v. Mamulal, 98, 102, 139.
 Mountain v. Bennett, 47.
 Mowjibhoy v. Muljibhoy, 350.
 Moyle v. Moyle, 364.
 Muddun Mohun v. Kali Churn, 291.
 Muhammad v. Fatima, 106.
 Muhammed v. Puttan Bibi, 233, 396.
 Muktanath v. Jitendra, 55.
 Mulchand v. Kulkshmani, 102, 103.
 Mulji v. Bai Ujam, 177.
 Mullick v. Mullick, 333.
 Mullick's Case, 137.
 Mutassini v. Maruthammal, 330.
 Murari Lal v. Kundan Lal, 77, 80.
 Murray, In the goods of, 259.
 Murugappa v. Ponnusami, 320.
 Mussammatt Padma v. Dharma Das, 39.
 Mussammatt Sasinan v. Shih Narayan, 73.
 Mussammatt Sita Koer v. Munshi Deo Nath, 6.
 Mussammatt Surajmani v. Rabi Nath, 73.
 Muscoorie Bank v. Haynor, 184.
 Must Jigri Begum v. Syed Ali, 371.
 Muthukana v. Vada Levisai, 148.
 Muthuswami v. Kaljani, 137.
 Mylone, In the goods of, 270, 271.

N

- Nafar Chandra v. Ratan Mala, 145, 173.
 Nagendratata v. Kashipati, 9, 292, 314.
 Nagindas, In the goods of, 146.
 Nana v. Bhawanji, 7.

N—contd.

Nana v. Shanker, 85.
 Nanabhai S. Mistry, Goods of, 85
 Nanchand v. Yenawa, 238, 239.
 Nandi Singh v. Sita Ram, 121.
 Nanhu v. Somirun, 247.
 Nani Bala v. Auckland, 321.
 Nannhu v. Gulabo, 376.
 Nanu v. Advocate General, 150, 151
 Naoroji v. Rogers, 33.
 Napen Bala v. Sita Kanta, 4, 30
 Napendra v. Satadal, 239.
 Narasimha v. Parthasarathy, 72, 75
 Narasimulu v. Gulam Hussain, 241.
 Naraya v. Pandurang, 235.
 Narayan v. Municipal Commissioner, 321.
 Narayan v. Shajani, 328
 Narayan v. Tatia, 238.
 Narayani v. Adm.-General, 182
 Narayanasami v. Esa Abbay, 317, 318, 319.
 Narayanasami v. Kuppasami, 367, 371.
 Narendra v. Charu Chandra, 278.
 Nares Re, 243
 Nash, In re, 134.
 Natha Kerra v. Dhunbaiji, 103, 182, 184
 Navalechand v. Manekchand, 178
 Navazbai v. Pestonji, 316.
 Navroji M. Wadia v. Perojibai, 121
 Nawalmal v. Dhanu Mahhand, 40, 44.
 Neate v. Pickard, 71
 Nemdhari v. Mussummat Bissessari, 239.
 Nepusi v. Nasiruddin, 239.
 Nesbitt, In re, 270.
 Newman v. Piercey, 79
 Newton v. Clarke, 83.
 Newton v. Mertopolitah Railway Co., 256.
 Newton, In the goods of, 293
 Nidhoomoni v. Saroda, 80
 Nikunja Rani v. Secretary of State, 400.
 Nilkomul v. Reed, 338.
 Nilmoni Singh v. Umanath Mookerjee, 291.
 Nirmal Chunder v. Saratmoni, 53.
 Nirod Barani v. Chamat Karini, 274.
 Nirojini Debi, In the goods of, 272.
 Nishi Kanta v. Ashu Tosh, 257.
 Nistarini v. Behary Lal, 165.
 Nistarini v. Brahmomoyi, 284, 286
 Nittoyo Kali v. Kedar Nath, 242.
 Nitya Gopal v. Narendra Nath, 52, 53, 54.
 Nrittya Gopal v. Adm.-General, 247
 Nobodoorga, In re, 269.
 Nolon Chandra v. Bhobosconduri, 288.

N—contd.

Nogendra v. Benoy, 148.
 Norendra Nath v. Kamalbasini, 71, 161.
 Norman v. Norman, 192.
 Norris v. Norris, 201.
 Northern's Estate Re, 77.
 Norton v. Frecker, 364.
 Nugent v. Nugent, 330.
 Nundo Lal, In the goods of, 255, 326.
 Nursing Chunder Bysack, In the goods of, 326,
 327.
 Nuzhatuddowla v. Mirza Kurratulain, 306.

O

Ochavram v. Dolatram, 247, 258.
 O'Dwyer v. Geara, 247
 Ogle v. Knipe, 88.
 Okhoy v. Koylash, 342, 346.
 Okhoymoney v. Nilmoney, 175.
 Olding, In the goods of, 54.
 O'Mahoney v. Burdett, 163.
 Ommaney v. Butcher, 87.
 Omrita Nath v. Adm.-General, 335, 337.
 Onslow v. South, 156.
 Orr v. Kaines, 357.
 Oswald, In the goods of, 279.
 Ouchterlony v. Ouchterlony, 328.
 Oxley, In re, 365.

P

Packer v. Scott, 133.
 Padam Lal v. Tek Singh, 73.
 Paddy, Ex-parte, 256.
 Padget v. Priest, 316, 317.
 Padman v. Hanwanta, 66.
 Padmanabha v. Williams, 331.
 Page v. Leapingwell, 190.
 Page v. Page, 122.
 Pakiam v. Iznasi, 311.
 Palaniyandi v. Veerammal, 239.
 Pallamnaju v. Bapanna, 240.
 Palmer v. Holford, 131.
 Panchu Gopal v. Kalidasa, 209.
 Pande Har Narayan v. Surja Kunwari, 148.
 Pandit Brayag Raj v. Goukaran Pershad, 247.
 Pandurang v. Markandeya, 54.
 Pandurang v. Vinayak, 68.
 Parhati v. Ram Harun, 91, 92, 149.
 Parker v. Felgetti, 40.
 Parker v. Kett, 317.

P—contd.

Parker in Goods of, 123.
 Parkin Re, Hill v. Schwarz, 51.
 Park's Settlement, Re, Foran v. Bruce, 133.
 Parsons v. Lance, 9.
 Partha Sarathy v. Mukundammal, 326.
 Parthasarathy v. Thiruvengada, 92.
 Pateshuri v. Bhagwati, 240.
 Pathummabi v. Vittil, 238.
 Patridge v. Patridge, 193.
 Paul v. Children, 112.
 Paul v. Simpson, 319.
 Pawley and London and Provincial Bank, In re, 231.
 Payne & Co., v. Perojshah, 30.
 Peacock v. Stockford, 109.
 Pearce, In re, Alliance Assurance Co., v. Francis, 112.
 Pearke v. Moseley, 141.
 Pearson v. Henry, 330.
 Peary Mohun v. Narendra, 334.
 Peck v. Halsey, 91.
 Peck v. Parrott, 160.
 Peel, In the goods of, 77.
 Penny v. Turner, 104.
 Penta Reddi v. Anki Reddi, 219.
 Pera Reddi v. Mohamed, 240.
 Perera v. Perera 40.
 Periya v. Narayana, 185.
 Perrin v. Lyon, 169, 173.
 Pestonji v. Framji 75, 77, 211.
 Pestonji v. Khurshedbai, 108, 127.
 Petts, In re, 78.
 Petty v. Willson, 88.
 Philips v. Chamberlaine, 77.
 Philips v. Hartley, 237.
 Phillips v. Phillips, 364.
 Phipps v. Ackers, 159.
 Phul Chand v. Kishmish, 225.
 Phundan Lal v. Arya, 149.
 Pigot and Gascoigne's Case, 272.
 Pinbury v. Elkin, 160.
 Pinchon's Case, 232.
 Projshah v. Pestonji, 290, 305.
 Pirsab v. Gurappa, 6.
 Pitamber v. Ishwar, 379.
 Pitamber Girdhar, In re, 284, 290.
 Pitman v. Crum Ewing, 214.
 Pokurmul Augurwallah, In the goods of, 393.
 Ponnusami v. Dorasami, 4.
 Pooley, Re, 61.
 Poorendra v. Hemangini, 45.
 Porrin v. Lyon, 169, 173.

P—contd.

Portal and Lamb, Re, 94.
 Porter v. Fox, 140.
 Porthouse, Goods of, 52.
 Potter's Trust, Re, 104.
 Poultney v. Poultney, 164, 167.
 Powell v. Davies, 79, 94.
 Powell v. Evans, 362.
 Powell v. Powell, 67.
 Powell v. Stratford, 250.
 Powell's Trust Re, 87.
 Powis, In the goods of, 304.
 Prafulla Chunder v. Jogendra, 92, 169, 142.
 Pramada v. Lakhi, 215, 217.
 Pran Nath v. Jadu Nath, 253, 313.
 Frankisto v. Nokolip, 234, 367.
 Prasad v. Motilal, 312.
 Prasannamoyi v. Baikuntha, 43, 44, 47.
 Pratt v. Methew, 78, 112.
 Prem Chand v. Surendra Nath, 246, 245.
 Premchand In the Goods of, 214.
 Prevost v. Prevost, 169.
 Price v. Page, 84.
 Primrose, In the goods of, 259, 260.
 Prinsep v. Dyce Sombre, 43.
 Probodh Lal v. Harish Chandra, 79, 80.
 Prosono Koomar v. Adm-General of Bengal, 187.
 Prosunno v. Kristo, 234, 237, 318.
 Pudmanund v. Hayes, 109.
 Pulliah Chetty, v. Varadarajulu, 102.
 Punchard In the Goods of, 249.
 Punchoo Money v. Troylucko, 73.
 Pundit v. Goukaran, 247, 265, 312.
 Pura Sundari v. Bijraj, 324.
 Purmannudas v. Venayekrao, 145.
 Purna Chandra v. Nobin Chandra, 326.
 Purna Shashi v. Kalidhan, 137, 176.
 Purshotam v. Kala, 234, 241.
 Puthummabi v. Vittil, 238.
 Puthibai v. Sorabji, 130, 131, 145, 169, 192.
 Pym v. Lockyer, 212.

R

Radclyffe v. Buckley, 110.
 Radford v. Radford, 81.
 Radha v. Gopal, 373.
 Radha Monohur Mookerjee, In the matter of, 249.
 Radha Prosad v. Ranimoni, 71, 139, 175, 176.
 Radhabai v. Ganesh, 55.
 Radhakrishna v. Subraya, 52.

R—contd.

Radhasbyam v. Ranga Sundari, 266, 304.
 Raghavendra v. Bhima, 238.
 Raghavjee v. Narandas, 139.
 Raghu Nath v. Musst Pate Koer, 242, 257, 258.
 Raghur v. Ram Rakhan, 68.
 Rahmat v. Abdul, 288.
 Rahamtullah v. Rama Rau, 287, 290.
 Rai Bishunchand v. Mussumat Asmaida Koer, 141.
 Rai Kishori v. Debendranath, 64.
 Raine, In the goods of, 8.
 Rainsford v. Taynton, 277.
 Raja of Kalahasti v. Achigadu, 367.
 Rajah Chundernath v. Kooar Gobindnath, 106.
 Rajah Parthasarathy v. Rajah Venkatadri, 231, 317, 318, 346.
 Rajain v. Edalapalle, 372.
 Rajamaannar v. Venkatakrishnayya, 354.
 Rajamma v. Ramkrishnayya, 376.
 Rajammal v. Authiammal, 6, 248.
 Rajani v. Ramnath, 326.
 Rajendra v. Mrinalini, 171.
 Rajendra v. Raj Coomari, 92, 145, 149.
 Rajkumari v. Collector of Gaya, 402.
 Raj Narain v. Ful Kumari, 308, 309.
 Rajnarain v. Ashutosh, 73.
 Rajnarain v. Katyayani, 73.
 Ram Kuar v. Sardar Singh, 369.
 Ram Gopal v. Aipna, 43, 44.
 Ram Lal v. Bidhumukhi, 145.
 Ram Lal v. Jugoo Mohun, 327.
 Ram Narayan v. Ram Saran, 73.
 Ram Piari v. Krishna Piari, 121.
 Ram Saran v. Ram Narayan, 73.
 Ram Sarup v. Bela, 169.
 Ramachandra v. Ramachandra, 102.
 Ramamirtham v. Ranganathan, 123.
 Ramenath v. Kanai Lal, 327.
 Ramani v. Kumud, 294.
 Ramasami v. Veerappa, 318.
 Rambhajan v. Gurcharan, 51.
 Rambhat v. Lakshman, 7.
 Ramchander v. Bapu, 240.
 Ramchander Ghose, In the goods of, 392.
 Ramchandra v. Vijayaraghavulu, 86, 102.
 Ramchandra, In re, 369.
 Rameshwar v. Lachmi, 169.
 Ramlal v. Kanai Lal, 109, 141, 142.
 Ramlal v. Secretary of State, 73, 163.
 Ramma Reddi v. Pari Reddi, 376.
 Ramnol v. Hahol, 51.

R—contd.

Ranchordas v. Bhagubai, 239.
 Ramee Mani v. Premmoni, 156.
 Ranganadha v. Bagirathi, 137.
 Rango v. Mudiyeppa, 80.
 Rangubai v. Abaji, 377.
 Rani Raisunnissa v. Rani Khujunnissa, 367.
 Ranjit Singh v. Jaganath, 265, 276.
 Ranjitsinghji v. The Bank of Bombay, 374.
 Rashid v. Sherbanoo, 221.
 Rashmohini v. Umesh Chunder, 43, 44.
 Rau Narsinga, Ex-parte, 374.
 Ravji v. Vishnu, 294, 296.
 Read's Case, 316.
 Reddell v. Dobree, 220, 222.
 Redding, Re, 52.
 Reed v. Devaynes, 187.
 Reeve's Trusts, Re, 187.
 Remfry v. De Penning, 337.
 Rhodes v. Rhodes, 47, 279.
 Rice v. Gordon, 364.
 Richard Skinner v. Durga Prasad, 2, 4, 79, 109.
 Richard Skinner v. Naunihal, 106, 138.
 Richard Taylor v. Raja of Parlakimedi, 186.
 Ridout v. Pain, 90.
 Riordan v. Banon, 186.
 Roberts v. Higman, 109.
 Roberts v. Roberts, 9.
 Robertson v. Broadbent, 72.
 Robertson v. Smith, 7.
 Robinson v. Ommanney, 51.
 Robinson v. Pett, 328.
 Robinson, In the goods of, 6.
 Roddy v. Fitzgerald, 72.
 Rogers v. Goodenough, 70.
 Rogers v. James, 256.
 Rogers v. Pittis, 70.
 Rojomoyee v. Troylukho, 93, 148, 149, 169.
 Romesh Chunder v. Rajani Kant, 53.
 Rosaz, In the Goods of, 85.
 Rose Anne D'Silva, In the goods of, 296, 299.
 Rose Learmouth, In re, 296.
 Ross's Trust, Re, 30.
 Roymoney Dossee, In the goods of, 53.
 Run Bahadur v. Moharanees Rajrup, 307.
 Runchordas v. Parvatibai, 92.
 Rupan Bibi v. Bhagelu Lal, 374, 375.
 Rupchand v. Sarbassur, 163.
 Russell v. Plaiice, 323.
 Rushton, In the goods of, 367.
 Rustomji F. Lentin, Re, 116.
 Ryder, In the goods of, 242.
 Bymer, In re, Bymer v. Stanfield, 119, 159.

S

S—contd.

- Sabju v. Noordin, 239.
 Sachindra v. Hironmoyee, 466.
 Sadhir v. Gobinda, 232.
 Sagar Chandra v. Dwarka Nath, 6.
 Sagore Chandra v. Digamber, 6, 52.
 Sahadev v. Sheikh Sakawat, 238, 239.
 Sahib Mirza v. Umda Khanam, 61, 193, 311, 353.
 Sailaja v. Jadu Nath, 312.
 Sajid Ali v. Ibad Ali, 42, 43, 48.
 Sakina v. Muhomed, 236, 327.
 Salebbhai v. Bai Safiabu, 148, 149, 150.
 Sallay Mahomed v. Lady Janbai, 43, 48, 49, 107, 108.
 Sami v. Chokshi Ishvardas, 309.
 Sankara v. Nairar, 374.
 Sankey v. Lilley, 44.
 Santana v. The Adv.-General, 150, 151.
 Santaya v. Savitri, 77, 82.
 Santos v. Pinto, 14, 15, 16.
 Sarabai v. Mahomed, 46.
 Sarabai v. Rabiabai, 222.
 Sarada Prasad v. Triguna, 54.
 Sardar Naoroji v. Putlibai, 68, 165, 182, 248.
 Sarat Chandra v. Bhupendra, 232, 326.
 Sarat Chandra v. Golap Sundari, 66, 267.
 Sarat Chandra v. Nani Mohan, 255, 320.
 Sarat Chandra v. Pratap Chandra, 91, 92.
 Sarat Kumari v. Amullyadhan, 49.
 Sarat Sundari v. Uma Prasad, 335.
 Sarkies v. Prosonomoyee, 3, 17.
 Saroda v. Kristo, 102.
 Saroja Sundari v. Abhay Charan, 266, 284, 288, 294.
 Saroje Bashini, In re, 396.
 Sarojini v. Rajlakshmi, 261, 266.
 Sasiman v. Shib Narayan, 73.
 Sassoon, In the goods of, 299, 392.
 Sato Koer v. Gopal, 222, 224, 230.
 Satya Prasad v. Motilal, 241, 253, 297, 331.
 Saunders v. Vautier, 157.
 Saunders, In re, 59.
 Savage v. Tyers, 181.
 Savage, In the goods of, 64.
 Sayad Jiaul v. Sitaram, 320.
 Sayaji v. Muttumabai, 249, 251.
 Schloss v. Stiebel, 78.
 Schott, In the goods of, 80.
 Scott v. Tyler, 323, 325.
 Seale v. Brown, 323.
 Seale v. Seale, 91.
 Seaman v. Everard, 364.
 Seehamma v. Chenappa, 250.
 Seehayya v. Narasamma, 102.
 Sethna v. Hemlingway, 237.
 Sewnarain Mohata, In the goods of, 6, 266, 363.
 Seymour's Case, 7.
 Shadi Jan v. Wabie Ali, 239.
 Shaik Moosa v. Shaik Essa, 233, 236.
 Shallicross v. Wright, 364.
 Shama Charn v. Khetromoni, 43, 50, 280.
 Shamavahoo v. Dwarkadar, 80.
 Shamah-un-Nissa v. Wajid Ali, 377.
 Shankar v. Dattatraya, 236.
 Shanker v. Unabai, 19.
 Shapoorjee B. Motiwalla v. Doodahoy B. Motiwalla, 18, 31.
 Sharfand v. Meldon, 317.
 Shashi Bhushan v. Rajendra, 291.
 Shaw v. Rhodes, 133.
 Sheikh Azim v. Chandra Nath, 291, 313.
 Sheikh Kalimuddin v. Meharui, 313.
 Sheldon v. Sheldon, 57.
 Shelley's Case, 99.
 Shooparasan v. Ramnandas, 258.
 Sher Bahadur v. Ganga Baksh, 110.
 Sherratt v. Mountford, 75.
 Shib Sabitri v. Collector of Meerut, 65.
 Shrinibai v. Ratanbai, 73, 97.
 Shitab Dei v. Debi Prasad, 371.
 Shookmoy v. Monohari, 137, 139, 207.
 Shushee Bhusan Bannerjee, In the goods of, 247, 250.
 Shri Beharilal v. Bai Rajbai, 326.
 Shri Raja Venkata v. Sri Raja Suraneni Venkata, 131.
 Shubhadra v. Chandra Kumar, 327.
 Shunmugaraya v. Manika Mudaliar, 42, 44.
 Sibley v. Cook, 120.
 Sibo Sundari v. Hemangini, 54.
 Sinammal v. Adv.-General, 4.
 Singleton v. Tomlinson, 56.
 Sir Mahomed Yusuf v. Hargovandas, 233, 236, 327.
 Sita Sundari v. Barada Prasad, 327.
 Sital Prasad v. Kaifut, 240.
 Siva Rau Vitla, 102, 103.
 Siva Sankara v. Subramania, 136.
 Sivamma v. Sabhamma, 371.
 Skey v. Barnes, 159.
 Skinner v. Naunihal Singh, 79.
 Sladen, In re, 270.
 Smell v. Dee, 156.
 Smith v. Attersoll, 186.
 Smith v. Everett, 331.

S—contd.

Smith v. Massey, 22, 91, 92, 148.
 Smith v. Smith, 331.
 Smith, Re, 9.
 Smith, In re, Prada v. Vandroy, 120.
 Smith's Case, 57.
 Smith's Trusts, In re, 107.
 Soames v. Martin, 209.
 Somasundara v. Ganga, 86, 103, 182.
 Sonatun Bysack v. Sreemutty, 148.
 Sookhmoy Chunder v. Srimati Monohurri, 137, 169.
 Sooleman Somjee v. Rahimtula Somjee, 324, 366.
 Soona Mayna v. Soona Navena, 230, 231, 237, 259.
 Soorjeemoney v. Denobundhoo Mullick, 160.
 Soudamini v. Gopal Chandra, 330.
 Soudaminy v. Jogesh Chunder Dutt, 141, 142.
 Soundarajan v. Natarajan, 131, 136, 138, 142, 163, 165, 183.
 Southern v. Woolaston, 126.
 Southouse v. Bate, 183.
 Spooner's Trust, 97, 117.
 Sprackling v. Ranier, 127.
 Sri Gajapathi v. Sri Gajapathi, 4.
 Sri Raja Rao Venkata v. The Court of Wards, 80.
 Sri Veerabhadra v. Chiranjivi, 168.
 Srigobind v. Musst Lalhari, 290.
 Srimati, In re, 376.
 Srinath Ghose v. Mukundram, 288.
 Srinivasa v. Dandayudapani, 11, 156.
 Srinivasa v. Venkatavarada, 330.
 Stackpoole v. Stackpoole, 364.
 Stahlschmidt v. Lett, 338.
 Standen v. Standen, 78.
 Stanhope's Trusts, Re, 106, 107, 108.
 Stausfield, In re, 108.
 Stapleton v. Cheales, 156.
 Stark, In the goods of, 309.
 Stephens v. Tapprell, 65.
 Stockil v. Punshon, 57.
 Stoney v. Stoney, 244.
 Storrs v. Benbow, 141.
 Stracy, In the goods of, 9.
 Strode v. Russell, 91.
 Stuart v. Cockerell, 141.
 Stummvoll v. Hals, 109.
 Styles v. Guy, 362.
 Subba Rao v. Palamanda, 377, 379.
 Subba Reddi v. Dorasami, 63, 66.
 Subbarayer v. Subbammal, 80.

S—contd.

Subramanian v. Bakku, 240.
 Subranania v. P. V. Murugesu, 138.
 Subroya v. Ragammall, 309.
 Suddasook v. Ram Chunder, 318.
 Sudhamani v. Surat Lal, 73.
 Sudhir v. Gobinda, 327, 365.
 Sugden v. Lord St. Leonards, 66, 268.
 Sughra Begam v. Muhamud, 239.
 Sukh Dei v. Kedar Nath, 43, 290.
 Sukh Nandan v. Rennick, 237, 246.
 Sukhia v. Secretary of State, 379.
 Sukumari v. Bharat Mandal, 283.
 Suleman v. Dorab Alikhan, 78, 841.
 Suna Ana v. S. R. M. Ramaswami, 72.
 Surajmani v. Rabi Nath, 73.
 Surbomongala v. Shashibhooshun, 290, 291.
 Surbomungola v. Mohendronath, 91, 92.
 Surendra v. Rani Dassi, 39, 49.
 Surendra Nath v. Amrita Lal, 285, 308, 309.
 Sures Chandra v. Lalit Mohun, 73.
 Surfogi v. Kamakshiamba, 368.
 Sushilabala v. Anukal, 260.
 Susil Kumar v. Apsari, 39.
 Syama Charan v. Prafulla, 288.
 Sydney v. Vaughan, 155.
 Swarnamoyee v. Secretary of State, 393, 398.

T

Tasiffe v. Taaffe, 338.
 Tagore v. Tagore, 45, 98, 109, 131, 137, 160, 177.
 Talbot v. Radnor, 162.
 Tarachurn v. Sureesh Chunder, 81, 165.
 Tarokeeshwar v. Shoshi, 137, 138.
 Tatersall v. Howell, 169.
 Tayaramma v. Sitaramasami, 169, 171.
 Taylor v. Popham, 160.
 Taylor v. Shore, 265.
 Taylor v. Taylor, 193, 275.
 Taylor, Re, 85.
 Telis v. Saldanha, 4.
 Tewson v. Tickell, 331.
 Thaker Madhavjee Dharamsi, In re, 279.
 Tharpe v. Stallwood, 246.
 Thelluson v. Woodford, 86, 133, 144.
 Theresa v. Francis, 52.
 Theresa v. Misquita, 52.
 Thomas v. Walberforce, 134, 162.
 Thomas, In the estate of, 270.

T—contd.

- Thompson v. Beasley, 111.
 Thompson v. Dun, 366.
 Thompson v. Harding, 317.
 Thompson's Trust, Re, 105.
 Thorby, Re, 329.
 Thornton v. Thornton, 268.
 Thorpe v. Bestwicke, 61.
 Tichborne v. Tichborne, 274.
 Tika Ram v. Deputy Commissioner, 326.
 Tillackchand v. Jitmal, 337.
 Tiluck Singh v. Parsotein, 288.
 Tirugnanapal v. Ponnammal, 6.
 Toleman, In re, 273.
 Toolseydas v. Premji, 122.
 Toolai Das v. Madan Gopal, 65.
 Toomey v. Rama, 320.
 Toscaul, In the estate of, 262.
 Townsend v. Barber, 363.
 Townsend v. Moore, 61.
 Townsend's Estate, In re, 61.
 Townson v. Tickell, 331.
 Treloar v. Lean, 67.
 Trevelyan v. Trevelyan, 66.
 Tribe v. Tribe, 53.
 Tribhuvandas v. Gangadass, 142.
 Tricumdas v. Haridas, 71, 148.
 Trimbak v. Narayan, 315.
 Tripurari v. Jagat Tarini, 101, 103, 181.
 Tuljaram v. Bomanji, 237.
 Tulsama v. Venkatasubbayya, 363.
 Tulsha v. Mathura, 82.
 Tupper v. Tupper, 67.
 Turnbull v. Duval, 49.
 Turner v. Green, 47.
 Turner v. Hardey, 331.
 Turner, In the goods of, 61.
 Tyler v. Merchant Taylors, 69.
 Tyrell v. Panton, 50.

U

- Ugarchand v. Surajmal, 295.
 Uma Charan v. Muktaakeshi, 327.
 Umanath Mookhopadhyaya v. Nilmony Sing,
 291.
 Umrao Chand v. Bindrahan, 313.
 Umrao Singh v. Lachhman Singh, 6, 7, 248.
 Underwood v. Wing, 175.
 University of Bombay v. Municipal Commis-
 sioner, 147, 149.

U—contd.

- University College of North Wales v. Taylor,
 56.
 Upendra v. Hem Chundra, 54, 145.
 Upendra v. Mohri, 306.
 Utteton v. Robins, 57.

V

- Vaidyanatha v. Chinnaasami, 249.
 Vaidyanatha v. Swaminatha, 92.
 Vairavan v. Srinivasachariar, 240.
 Van Straubenzee v. Monck, 247.
 Vaughan v. Haseltine, 350.
 Vaughton v. Noble, 49.
 Veal v. Veal, 221.
 Veerabhadra v. Chiranjivi, 178.
 Venkata v. Subba Rao, 92.
 Venkata v. The Court of Wards, 80.
 Venkatadri v. Parthasarathi, 316.
 Venkatanarayana v. Subbammal, 67.
 Venkatarangayan v. Krishnasami, 335.
 Venkateswarulu v. Brahmaravulu, 371.
 Venkaya v. Venkata, 67.
 Venkayamma v. Nannamma, 151.
 Venkayamma v. Venkata, 67.
 Verrell's Contract, Re, 325.
 Viegas N. C., In re, 265.
 Vijayarajnam v. Sudarana Rao, 40.
 Vinayak v. Gorindrav, 55, 67.
 Vinayak Raghunath v. G. I. P. Ry., 379, 321.
 Viner v. Francis, 108, 109.
 Visalatchmi v. Subba, 222.
 Vithal v. Gotya, 240.
 Vittal, Ex-parte, 247, 249, 250.
 Vullubhdas v. Thacker Gordhandas, 101.
 Vundravandas v. Cursondas, 92.
 Vydinada v. Nagammal, 121.

W

- Wagstaff v. Wagstaff, 93.
 Waigankar v. Wadekar, 33.
 Walford, In re, Kenyon v. Walford, 195, 353.
 Waikoley, In the goods of, 80, 279.
 Walker v. Symonds, 364.
 Walker v. Woolleston, 275, 277.
 Wallis v. Solicitor-General for New Zealand,
 150.

W—contd.

Wallop, *Ex-parte*, 78.
 Walter Rebells v. Maria Rebells, 266.
 Ward v. Grey, 120.
 Warrender v. Warrender, 15.
 Warring v. Warring, 42.
 Wartnaby, *In bonis*, 279.
 Warter v. Warter, 63.
 Waselun Huq v. Gowhuroonissa, 238, 367, 374.
 Watkins v. Adm.-General, 145.
 Watkins v. Sarat Chunder, 335.
 Watt v. Watt, 22.
 Weaver, *In the goods of*, 259.
 Webb v. Kelly, 181.
 Webb v. Kirby, 270.
 Webb v. Needham, 243.
 Webber v. Corbett, 84.
 Webber v. Stanley, 77.
 Webster v. Boddington, 141, 162.
 Webster v. Spencer, 253.
 Weddall v. Nixon, 247.
 Weeke's Settlement, *Re*, 97.
 Weir Hospital, *In re*, 150.
 Welch v. Phillips, 66.
 West v. Shuttleworth, 147.
 Weston, *Re*, 221.
 Wetdrill v. Wright, 265.
 Whale v. Booth, 323.
 Whicker v. Hume, 14, 257.
 Whistler v. Webster, 215, 218.
 Whitby v. Mitchell, 134.
 Whitby v. Von Ludeck, 135.
 White v. White, 147.
 White, *In the goods of*, 282.
 Whithorn v. Harris, 99.
 Whittaker v. Whittaker, 205.
 Widmore v. Woodroffe, 99.
 Wieland v. Bird, 275.
 Wightwick v. Lord, 117, 360.

W—contd.

Wilkins v. Jodrell, 209.
 Wilkinson v. Joughin, 78.
 Willand v. Fenu, 331, 364.
 William Rennis, *In the goods of*, 260, 270.
 Williams v. Evans, 288.
 Williams v. Jones, 120.
 Williams v. Jukes, 244.
 Williams v. Teale, 126.
 Williams v. Tyley, 67.
 Williams v. Williams, 333.
 Williams, *In re*, Metcalf v. Williams, 104.
 Williams, *In re*, Williams v. Williams, 157.
 Willing v. Baine, 119.
 Wilson v. Douglas, 96.
 Wilson v. Moore, 324.
 Wilson, *In re*, Twentymen v. Simpson, 150.
 Wilson, *In the goods of*, 310.
 Wingrove v. Wingrove, 44.
 Winsor v. Winsor, 295, 315.
 Witt v. Amis, 221.
 Wollaston v. King, 136.
 Woodward v. Gouldstone, 268.
 Woodward v. Lord Darcey, 338.
 Woolley v. Clark, 245.
 Woomeah Chunder v. Rashmohini Dass, 40, 43, 44, 55.
 Wren v. Kirton, 365.
 Wrey, *Re*, 157.
 Wroughton v. Colquhoun, 210.
 Wynne, *Goods of*, 52.

Y

Yakub Ebrahim v. Bai Rahimabai, 336.
 Yeshwant v. Shankar, 293, 294, 295.
 Yethirajulu v. Mukunthu, 167.
 Yorke-Smith v. Tribhewandas, 102.

THE INDIAN SUCCESSION ACT

BEING

Act No. XXXIX of 1925.

(RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE
30TH SEPTEMBER 1925).

*An Act to consolidate the law applicable to intestate and
testamentary succession in British India.*

WHEREAS it is expedient to consolidate the law applicable to
Preamble intestate and testamentary succession in British
India ; It is hereby enacted as follows :—

PART I.

Preliminary.

Short Title.

1. This Act may be called the Indian Succession Act, 1925.

COMMENTARY.

The statement of Objects and Reasons and the Report of the Select Committee are given in the Introduction. This Act is a consolidating Act and amongst others the following principal Acts have been consolidated into this Act and in consequence they are wholly repealed.

- (1) The Indian Succession Act X of 1865.
- (2) The Parsi Intestate Succession Act XXI of 1865.
- (3) The Hindu Wills Act XXI of 1870.
- (4) The Probate and Administration Act V of 1881.
- (5) The Native Christian Administration of Estates Act VII of 1901.

Several new sections have been added to the Indian Succession Act X of 1865 and the changes effected will be pointed out in their appropriate places.

Commencement of the Act.—There is no section in this Act as regards its commencement. Therefore under the General Clauses Act X of 1897, sec. 5, it comes into operation on the day on which it received the assent of the Governor-General. This assent was given on the 30th September 1925. As this is a consolidating and repealing Act, the Local Government has been empowered under Sec. 3 either retrospectively from the 16th day of March 1865 (on which date The Indian

should not be applied to Wills executed in India, *Sarkies v. Prosonomoyee*, 6 Cal. 794; *Nicholas v. Asphar*, 24 Cal. 216. The question of applying English law in this country was considered in the following further cases which may be of useful reference. *Freeman v. Fairlie*, 1 M. I. A. 305; *Adv.-General v. Surnomoyee*, 9 M. I. A. 387; *Lopez v. Lopez*, 12 Cal. 706; *Jalbhai A. Sett v. Louis Manoel*, 19 Bom. 680.

Scope and operation of the Act.—Sec. 2 of the Succession Act of 1865 is not reproduced. That section operated as a repeal of the previous existing law. *De Souza v. Secretary of State*, 12 B. L. R. 427. Sec. 392 is the repealing section under this Act; Sec. 3 empowers the Local Government to exempt from the operation of Sec. 5 to 49 (domicile, marriage and intestate Succession), 58 to 191 (Testamentary Succession, execution of Wills, and rules of construction), 212, 213, 215 to 369 (grants) the members of any race, sect or tribe. In its general scope therefore this Act applies to all persons wherever this Act would be declared to be in force except as provided by the Act.

To whom the Act applies.—It applies to

- (1) Europeans by birth or descent domiciled in British India. As regards the Portuguese it was held in *Lopez v. Lopez*, 12 Cal. 706 and *Antao v. Ardesir*, 1 Bom. L. R. 303 in appeal 2 Bom. L. R. 431 that they were governed by the English law.
- (2) Persons of mixed European and Native blood and East Indians.
- (3) Indian Christians except as provided by this Act.
- (4) Jews. As regards the Armenians it was held in *Nicholas v. Asphar*, 24 Cal. 216 that they were governed by English law.
- (5) Parsis, both as regards testamentary and intestate succession.
- (6) Hindus, including Sikhs and Jains and Mahomedans except as provided in the Act. It was held in *Bachebi v. Mukhanlal*, 3 All. 55 and *Chotay Lall v. Chunnoo Lall*, 4 Cal. 744 that the term Hindu included Jains and in *Bhagwankoe v. Bose*, 31 Cal. 11 P. C. that it included Sikhs. This Act expressly mentions Sikhs and Jains. As regards Brahmos it was held in *In the goods of Jnanendra Nath*, 26 C. W. N. 799 that they were not governed by the Succession Act X of 1865. It is submitted that under Act they would be included in the term Hindus.

ts. The people of Burma known as Kalias who married Burmese are also governed by this Act. *Ma Yait v. Maung Chit*, 49 Cal.

verts to Christianity.—The law applicable to converts before the Succession Act X of 1865 was not in a settled condition. The question before the Privy Council in the well-known case of *Abraham v. Abraham*, 1 A. 194 and their Lordships expressed the following opinion:—"That upon conversion of a Hindoo to Christianity, the Hindoo Law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion.....The profession of Christianity releases the convert from the trammels of the Hindu Law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in, and his

Succession Act of 1865 was given assent to by the Governor-General) or prospectively to exempt from the operation of certain sections any race or tribe to whom it would be impossible or inexpedient to apply the same. It would seem, therefore, that this being a consolidating Act, it is retrospective in its effect upto the 16th day of March 1865. See secs. 20 (2) (a), 22 (2) and 23. The Indian Succession Act X of 1865 was not retrospective, *Richard Skinner v. Durga Prasad*, 31 All. 239.

Law anterior to this Act and The Indian Succession Act X of 1865.—Before the passing of this Act, the Indian Succession Act X of 1865 governed the intestate and testamentary succession to the persons to whom it applied. It applied to Europeans, Jews, Armenians and East Indians professing the Christian religion. The Parsis had as regards intestacy their own separate Act being Act No. XXI of 1865 (The Parsi Intestate Succession Act); but in matters of Testamentary Succession they were governed by the Succession Act. As regards Hindus, the Hindu Wills Act and the Probate and Administration Act applied, which latter Act also applied to Mahomedans.

Previous to the passing of the Indian Succession Act X of 1865 the rights of succession and inheritance of the various communities and classes in British India were not in a settled condition. There was no *lex loci* in British India. The Hindus and the Mahomedans, who formed the bulk of the population in India, were governed by their own laws. But the Hindu and the Mahomedan laws were so interwoven with their respective religions that they were unfitted for persons professing a different faith. Hence the Christian subjects of the British Crown and other nations coming into British India were exempt from the operation of the Hindu and the Mahomedan Laws. The Bombay Reg. IV of 1827 (which is not repealed by this Act) enacted as follows:—

"The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant; and, in the absence of specific law and usage, equity and good conscience alone." The principle which the courts in India adopted in administering justice was that they assumed that there was no *lex loci* in British India and the practice had been to ascertain what was the law of the parties before them, with this limitation that all British subjects (technically so called) were to have English law administered to them.

As regards Non-Christian subjects and communities not coming under the denomination of Hindus and Mahomedans, they were governed by the customary law prevailing amongst them, as to which customs it was necessary for them to prove uniformity and continuity and also the convictions of those following them that they were acting in accordance with law.

In the absence of any customary law or proof thereof the English law was resorted to with this limitation that the artificial rules of construction adopted by English Courts were not applied to Wills executed in India, *Mayor D'Lyons v. East India Co.*, 1 Moo. P. C. 175; *Richard Skinner v. Durga Prasad*, 31 All. 239. The case of *Mayor D'Lyons v. East India Co.*, went further and their Lordships of the Privy Council laid down the limitation of applying English Statutes (*e.g.*, the Statute of Mortmain) which from their very nature were passed for reasons connected with England and declared that the principles laid down in such statutes

should not be applied to Wills executed in India, *Sarkies v. Prosonomoyee*, 6 Cal. 794; *Nicholas v. Asphar*, 24 Cal. 216. The question of applying English law in this country was considered in the following further cases which may be of useful reference. *Freeman v. Fairlie*, 1 M. I. A. 305; *Adv.-General v. Surnomoyee*, 9 M. I. A. 387; *Lopez v. Lopez*, 12 Cal. 706; *Jalbhai A. Sett v. Louis Manoel*, 19 Bom. 680.

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- (7) Buddhists. The people of Burma known as Kalias who married Burmese women are also governed by this Act. *Ma Yait v. Maung Chit*, 49 Cal. 310.

Hindu Converts to Christianity.—The law applicable to converts before the passing of the Succession Act X of 1865 was not in a settled condition. The question came before the Privy Council in the well-known case of *Abraham v. Abraham*, 9 M. I. A. 194 and their Lordships expressed the following opinion:—"That upon the conversion of a Hindoo to Christianity, the Hindoo Law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion..... The profession of Christianity releases the convert from the trammels of the Hindu Law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in, and

power over, property. The convert, though not bound as to such matters, either by the Hindu law or by any other positive law, may by his course of conduct after his conversion have shown by what law he intended to be governed as to these mattersthat the rights and interests in his property and his powers over it, should be governed by the law which he has adopted or the rules which he has observed." Macnaughten in his "Hindu Law," Vol. II., pp. 131-132 states that, "On the death of an apostate from the Hindu faith, his heirs according to Hindu law will take all the property which, he had at the time of his conversion, that his subsequent acquired property would be governed as to its devolution by the law of his new religion." According to the above Privy Council decision, therefore, Native Christians and such other native tribes as are not governed either by the Hindu or by the Mahomedan Law would be governed by the law which they had adopted by the course of their conduct or by the customary law which they had observed from times immemorial, *Richard Skinner v. Durga Prasad*, 31 All. 239; *Lastings v. Gonsalves*, 23 Bom. 539.

After the passing of the Succession Act X of 1865 the most earlier cases are *Re Joseph Vathiar*, 7 M. H. C. 121 and *Ponnusami v. Dorasami*, 2 Mad. 209. In *Dagrea v. Pacotti*, 19 Bom. 783 it was held that they were governed by the Succession Act and that case was followed in *Napen Bala v. Sita Kanta*, 15 C. W. N. 158, and *Adm.-Gen. v. Ananda Chari*, 9 Mad. 466. In the latest Privy Council case *Kamawati v. Digbijai*, 43 All. 525, 48 I. A. 381, their Lordships distinguished the case of *Abraham v. Abraham* and *Sri Gajapathi v. Sri Gajapathi*, 14, W. R. (P. C.) 33 as being the decisions before the passing of Succession Act of 1865 and held that if a Hindu convert to Christianity dies a Christian he is governed by that Act.

Rights of Converts in the Joint Family Property :—According to Hindu law every coparcener takes by birth a vested interest in the joint family property. The Act does not affect the right of coparcenership as between those to whom it applies. The Act does not take away any vested right of a coparcener, *Ponnusami v. Dorasami*, 2 Mad. 209. In *Tellis v. Saldanha*, 10 Mad. 69, however it was held that the right of survivorship of a co-parcener was a contingent right. Therefore if *A* and *B* being brothers in a coparcenary own property jointly and if *A* becomes a Christian and if *B* dies after the passing of the Succession Act the right of *A* to succeed to the whole property by survivorship is gone. This decision however has been disapproved in *Francis Ghosal v. Gabri Ghosal*, 31 Bom. 25 where it was held that the Succession Act did not affect the rights of coparcenership. In *Kulada Prasad v. Haripada Chatterjee*, 40 Cal. 407 it was held, that upon the conversion of a member of a joint Hindu family to Christianity the member continued to hold the ancestral property as joint owner and he was entitled to recover possession of his share on the basis that there was a dissolution of the family at the date of his conversion, that he was not liable to satisfy the debts of his father incurred and charged upon ancestral property subsequent to the date of his conversion but was liable for debts incurred prior to conversion.

Rights of the Hindu Relations of a Convert to the convert's property.—The question of the right of the parents of the convert to the convert's property was considered in the following two cases, *Sinammal v. The Adm.-General*, 8 Mad. 169, and *Adm.-General v. Anandachari*, 9 Mad. 467, both of which suits related to the same estate of a Hindu convert. The facts are: *A* became a Christian, his wife *S* refused to live with him and renounced all claim to his estate. *A* married *M* a

Christian and died intestate leaving property. *S* filed a suit claiming the estate but she died and her suit abated. Administrator-General took possession of the property and filed a suit for administration of the estate which was claimed by (a) father of *A*, (b) undivided brother of *A* and (c) executors of *M*. Held that *S* was the wife of *A* and that the marriage of *A* with *M* was not legal, that if *S* had not released her claim she would be entitled to half of the estate. Held, accordingly that under Sec. 35 of the Succession Act X of 1865 the father was entitled to the whole of the estate.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

- (a) "administrator" means a person appointed by competent authority to administer the estate of a deceased person when there is no executor;
- (b) "codicil" means an instrument made in relation to a will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the will;
- (c) "executor" means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided;
- (d) "Indian Christian" means a native of India who is, or in good faith claims to be, of unmixed Asiatic descent and who professes any form of the Christian religion;
- (e) "minor" means any person subject to the Indian Majority Act, 1875, who has not attained his majority within the meaning of that Act, and any other person who has not completed the age of eighteen years; and "minority" means the status of any such person;
- (f) "probate" means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator;
- (g) "province" includes any division of British India having a Court of the last resort; and
- (h) "will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

This is Sec. 3 of the Succession Act X of 1865 with the following changes—The definitions of "person," "year," "month," "immovable property," "moveable property," "Local government," "High Court," "British India," "District Judge" are dropped. For the definition of these words see the General Clauses Act X of 1857. The definition of "minor" and "minority" is adopted from the Probate and Administration Act. No change has been made in the other definitions. The definition of "Indian Christian" is taken from the Native Christian Administration of Estates Act VII of 1911 except that the phrase "Indian Christian" has been used instead of "Native Christian."

COMMENTARY.

Administrator and Executor.—The distinction between the two is well pointed out in the section. An executor is always appointed by will and derives his authority therefrom. His appointment may be either express or implied and in the latter case he is called executor according to the tenor. An administrator is always appointed by Court where there is no executor and he derives his title from the grant.

Minor.—Under the Indian Majority Act, Sec. 3 it is enacted that every minor of whose person or property a guardian other than a guardian *ad litem* is appointed or declared "by any Court of Justice before the minor has attained the age of eighteen years and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age shall notwithstanding anything contained in the Indian Succession Act (X of 1865) or in any other enactment be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before; subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before." In the goods of *Effie Jessie Caroline*, 28 C. W. N. 527. In accordance with the above definition of 'minor', a person residing in a Native State though he may be a major according to the law of that State will be a minor if he has not completed the age of 18 years, In the goods of *Seunaram Mohata*, 21 Cal. 911. As to how the age is to be computed see sec. 4 of the Indian Majority Act.

Will and Codicil.—A will is an instrument by which a person disposes of his property to take effect after his death. In these latter words a will differs from a deed which takes effect *inter vivos*, i. e., during life. A codicil is an instrument which alters, modifies, or adds to the provisions of a will. The proper word for a will is testament.

Characteristics of Wills.—As above stated a will is in its nature a different thing from a deed. Its peculiar property is that it is in all cases revocable, *Rajammal v. Authiammal*, 20 M. L. J. 519 and it comes into operation not immediately on execution but on the death of the testator. Hence a will is said to be ambulatory until the death of the testator. One of the tests to ascertain whether an instrument is a will or a deed is to see if it is revocable, *Musst. Sita Koer v. Munshi Deo Nath*, 8 C. W. N. 614; *Dintarini v. Krishna*, 13 C. W. N. 292. A document which is plainly intended to be operative immediately and to be final and irrevocable is a non-testamentary instrument, *Umrao Singh v. Lachhman Singh*, 33 All. 344; *Re Reference by Collector*, 20 Bom. 210 F. B.; *Pirsab v. Gurappa*, 38 Bom. 227. But a deed not intended to have any effect till the settlor's death is testamentary, In the goods of *Robinson*, 1 P. & D. 384.

The mere fact that the testator calls it irrevocable does not alter its quality, *Sagar Chandra v. Dwarka Nath*, 14 C. W. N. 174. Nor does the fact that the writer of the instrument calls it a will make it a testamentary document, *Tirugnanapal v. Ponnammal*, 25 C. W. N. 511 (P. C.). Another test is to ascertain whether the dispositions made by the instrument are intended to take effect immediately on execution or during any period in the life of the executant or whether the dispositions are to take effect after his death, *Sagore Chandra v. Digamber*, 14 C. W. N. 174. An instrument may be partly of a testamentary character and partly a deed, *Chandmal v. Lachhmi*, 22 All. 162, and probate may be granted of a part of

the will, *Kadar Nath v. Sarojini Dasi*, 26 Cal. 634. In the case however of an instrument of which one part is proved to be of a testamentary character the court may presume that the remainder is also intended to be testamentary, *In re Komola Kant Biswas*, 4 C. H. C. 401.

Examples.

- (a) A deposited a certain sum of money with B and filled up a printed form containing the following particulars:—(1) Name of the person entitled to receive the deposit paid by me after me C (2) Relationship.....(3) Profession or occupation... ..C sued for recovery after A's death Held that the document amounted to a will and that C could not recover unless the will was duly executed and attested, *Nana v. Bhawani*, 43 Mad. 728.
- (b) A Hindu executed the following document:—"I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner. None of my heirs shall have cause to raise disputes touching this matter. This will has been executed by my consent" Held that the document was not a will, *Bheema Deo v. Behari Das*, 44 Mad. 733 P. C.
- (c) A Hindu by an instrument provided as follows—"As long as I live I take the profits and you should maintain me as if I were one of the members of your family. I have no ownership therein, the ownership belongs to you from this daywhatever property there may be after my death other than that described above is all given to you." Held that the instrument was not a will but a conveyance, *Rambhat v. Lakshman*, 5 Bom. 630.

Form of Will.—A will may be in any form, it is not necessary that it should be of a testamentary form in order to operate as a will (*Din Tarini v. Krishna Gopal*, 36 Cal. 149) but there must in all cases be the *animus testandi*, i. e., the intention that the writing should operate as a will. Thus agreements, letters, bills of exchange, powers-of-attorney, a matrimonial arrangement deed, and other instruments may take effect as wills, if duly executed, where a testamentary intention can be collected, and the dispositions are not to take effect until after the death of the person making them, *Robertson v. Smith*, L. R. 2 P. & D. 43; *Habergham v. Vincent*, 2 Ves. 204; *Din Tarini v. Krishna*, 36 Cal. 149. It is very often contended that a deed and especially a deed of gift or a deed of family settlement (*Umrao Singh v. Lachhman Singh*, 33 All. 344 P. C.) which is inoperative for want of stamp or registration or other prescribed formalities should operate as a will. But in order that a document should have the effect of a will, it must satisfy the following two tests:—

(1) That it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it, if considered as a will, i. e., the writer had the *animus testandi*.

(2) That death was the event that was to give effect to it. If the writing confers or is intended to confer benefits *inter vivos*, without any reference to the death of the party conferring it, it cannot be established as a will. *Glynn v. Oglender*, 2 Hagg. 428. (Williams on Executors, 10th Edn. pp. 81-84).

Language of Will.—A will may be written in any language and no technical words are necessary. Only that the wording shall be such that the intention of the testator can be known therefrom (sec. 74). A will may be written with any material—ink or pencil. It may be partly in ink and partly in pencil. *Bateman v. Pennington*, 3 Moore's P. C. 223. But if the will is once written in ink and there

COMMENTARY.

Administrator and Executor.—The distinction between the two is well pointed out in the section. An executor is always appointed by will and derives his authority therefrom. His appointment may be either express or implied and in the latter case he is called executor according to the tenor. An administrator is always appointed by Court where there is no executor and he derives his title from the grant.

Minor.—Under the Indian Majority Act, Sec. 3 it is enacted that every minor of whose person or property a guardian other than a guardian *ad litem* is appointed or declared "by any Court of Justice before the minor has attained the age of eighteen years and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age shall *notwithstanding anything contained in the Indian Succession Act* (X of 1865) or in any other enactment be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before; subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before." *In the goods of Effie Jessie Caroline*, 28 C. W. N. 527. In accordance with the above definition of 'minor', a person residing in a Native State though he may be a major according to the law of that State will be a minor if he has not completed the age of 18 years, *In the goods of Sewnarain Mohata*, 21 Cal. 911. As to how the age is to be computed see sec. 4 of the Indian Majority Act.

Will and Codicil.—A will is an instrument by which a person disposes of his property to take effect after his death. In these latter words a will differs from a deed which takes effect *inter vivos*, i. e., during life. A codicil is an instrument which alters, modifies, or adds to the provisions of a will. The proper word for a will is testament.

Characteristics of Wills.—As above stated a will is in its nature a different thing from a deed. Its peculiar property is that it is in all cases revocable, *Rajam-mal v. Authiammal*, 20 M. L. J. 519 and it comes into operation not immediately on execution but on the death of the testator. Hence a will is said to be ambulatory until the death of the testator. One of the tests to ascertain whether an instrument is a will or a deed is to see if it is revocable, *Musst. Sita Koer v. Munshi Deo Nath*, 8 C. W. N. 614; *Dintarini v. Krishna*, 13 C. W. N. 292. A document which is plainly intended to be operative immediately and to be final and irrevocable is a non-testamentary instrument, *Umrao Singh v. Lachhman Singh*, 33 All. 344; *In Re Reference by Collector*, 20 Bom. 210 F. B.; *Pirsab v. Gurappa*, 38 Bom. 527. But a deed not intended to have any effect till the settlor's death is testamentary, *In the goods of Robinson*, 1 P. & D. 384.

The mere fact that the testator calls it irrevocable does not alter its quality, *Sagar Chandra v. Dwarka Nath*, 14 C. W. N. 174. Nor does the fact that the writer of the instrument calls it a will make it a testamentary document, *Tirugna-napal v. Ponnammal*, 25 C. W. N. 511 (P. C.). Another test is to ascertain whether the dispositions made by the instrument are intended to take effect immediately on execution or during any period in the life of the executant or whether the dispositions are to take effect after his death, *Sagore Chandra v. Digamber*, 14 C. W. N. 174. An instrument may be partly of a testamentary character and partly a deed, *Chandmal v. Lachhmi*, 22 All. 162, and probate may be granted of a part of

the will, *Kadar Nath v. Sarojini Dasi*, 26 Cal. 634. In the case however of an instrument of which one part is proved to be of a testamentary character the court may presume that the remainder is also intended to be testamentary, *In re Komola Kant Biswas*, 4 C. H. C. 401.

Examples.

- (a) A deposited a certain sum of money with B and filled up a printed form containing the following particulars—(1) Name of the person entitled to receive the deposit paid by me after me C (2) Relationship.....(3) Profession or occupation.....C sued for recovery after A's death. Held that the document amounted to a will and that C could not recover unless the will was duly executed and attested, *Nana v. Bhawan*, 43 Mad. 728.
- (b) A Hindu executed the following document:—"I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner. None of my heirs shall have cause to raise disputes touching this matter. This will has been executed by my consent." Held that the document was not a will, *Bheema Deo v. Behari Das*, 44 Mad. 733 P. C.
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are pencil alterations therein, there will be a presumption that the alterations are deliberative; if in ink they are final and absolute, *Hawkes v. Hawkes*, 1 Hagg. 322. It is also not necessary that the testator himself should write the will; it may be written by any person. But if it is written by a person who himself benefits by it, the rule in *Barry v. Bullin*, 2 Moo. P. C. 480 must be borne in mind.

Different Kinds of Wills.—The Succession Act mentions only two kinds of Wills—a privileged will and an unprivileged will.

A "Privileged Will" is a will made by a soldier employed in an expedition, or engaged in actual warfare or by a mariner at sea.

An "Unprivileged Will" is a will made by a person, not being a soldier employed in an expedition or engaged in actual warfare or a mariner at sea. This is the ordinary will.

Nuncupative or Oral Will.—An oral or nuncupative will is a will declared by a testator before a sufficient number of witnesses. The word "nuncupative" is derived from *nuncupando* meaning naming, because when a man makes a nuncupative will he must name his executor and declare his whole mind before witnesses. This kind of will is not mentioned in the Succession Act. It is therefore not competent for any person governed by this Act to make a Nuncupative will. But Hindus who are not governed by the Hindu Will's Act and Mahomedans can make a nuncupative will of property whether moveable or immoveable. *Crinivasammal v. Vijayammal*, 2 M. H. C. 37; *Hari Chintaman v. Moro Lakshman*, 11 Bom. 89; *Subbaya v. Surayya*, 10 Mad. 251.

Holograph Will.—A holograph will is a will which is written by the testator himself. Such a will is included in the above definition of an unprivileged will.

Inofficious Will.—A will which is not consonant with the testator's natural affection and moral duties is called an inofficious will.

Mutual Wills.—A mutual will is one of two testamentary documents made respectively by two persons giving each other similar rights in each other's property. Two persons may agree to make mutual wills which remain revocable during their joint lives by either of them with notice to the other. The peculiar characteristic of this kind of wills is, that they become irrevocable after the death of one of them, if the survivor takes advantage of the provisions made by the other, *Dias v. De Livera*, 5 App. C. 123 (P. C.); *Dufour v. Pereira*, 1 Dick. 419; *Minakshi v. Viswanath*, 33 Mad. 406. As will be seen hereafter every will is revoked by the marriage of the maker (sec. 69); but where two persons make mutual wills, the marriage of one of them does not revoke the will of the other, *Hinckley v. Simmons*, 4 Ves. 160.

Joint Will.—By a joint will is meant a single instrument by which two persons give effect to their testamentary wishes. Such a will is revocable at any time by either of them or by the survivor, *Hobson v. Blackburn*, 1 Add. 277. But in certain cases it will be enforced in equity as contracts, *Dufour v. Pereira*, 1 Dick. 419. A joint will is valid so far as regards the property of each testator, and will be entitled to probate on his death, unless it is to take effect on the death of all the joint testators. Ordinarily it is required to be proved on the death of each and probate may be granted on the death of the first dying and again on the death of the survivor.

(Coote's Probate Practice 15th Edn. 34), *In the goods of Stracy*, 1 Deane Ecc. Rep. 6; *In the goods of Raine*, 1 Sw. and Tr. 144; *In the goods of Letitia Lovegrove*, 2 Sw. and Tr. 453.

It is competent for two Hindus to make a joint will, *Minakshi v. Viswanatha*, 33 Mad. 406; *Jethabhai v. Parshotam*, 45 Bom. 987.

Contingent or Conditional Will.—A will may be made contingent upon the happening of an event, so that if the event does not happen the will has no effect, *Roberts v. Roberts*, 2 Sw. and Tr. 337. In order that a will should be regarded as conditional or contingent it must plainly appear from the terms of the will that its provisions were intended to take effect only in the event of the happening of the contingency and not otherwise, *e. g.*, a testator being about to travel makes a will in the following words:—"This is to take effect if I do not return from the voyage on which I am now starting." The testator returns home and dies. The will has no effect and is not entitled to probate. *Parsons v. Lanoe*, 1 Ves. Sen. 189. The usual expression used by a testator in this country that he is led to make the will by reason of uncertainty of life is not to be deemed conditional (see Mortimer on Probate p. 286). A will may be made conditional on the assent of a third person to its provisions and if that assent is withheld the instrument is not entitled to probate, *Re Smith*, (1869) 1 P. and D. 717.

Duplicate Will.—A will may be made in duplicate. But where the will is executed in duplicate, one of which the testator retains while he deposits the other in the custody of another, the destruction of the duplicate in the testator's possession revokes the whole, *Seymour's case* 1 P. W. 346, 2 Vern: 742.

Probate.—A copy of the will by which the executor is appointed certified under the seal of the court is usually called probate. For form of Probate see Schedule VI of this Act.

High Court.—The definition is omitted. See General Clause's Act. It means High Court both in its original and its appellate jurisdiction, *Nagendrabala v. Kashipati*, 37 Cal. 224.

3. (1) The Local Government may, by notification in the local official Gazette, either retrospectively from the sixteenth day of March 1865, or prospectively, exempt from the operation of any of the following provisions of this Act, namely, sections 5 to 49, 58 to 191, 212, 213 and 215 to 369, the members of any race, sect or tribe in the province, or of any part of such race, sect or tribe, to whom the Local Government considers it impossible or inexpedient to apply such provisions or any of them mentioned in the order.

Power of Local Government to exempt any race, sect or tribe in the territories administered by the Local Government from operation of Act.

(2) The Local Government may, by a like notification, revoke any such order, but not so that the revocation shall have retrospective effect.

(3) Persons exempted under this section or exempted from the operation of any of the provisions of the Indian Succession Act, 1865, under section 332 of that Act are in this Act referred to as "exempted persons."

(This section is new.)

COMMENTARY.

This section empowers the Local Government to exempt any community from the operation of sections relating to domicile, marriage, intestate succession, testamentary succession, execution of wills, rules of construction and grants.

PART II.

Of Domicile.

Application of Part. 4. This Part shall not apply if the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina.

(This section is new.)

COMMENTARY.

This section excludes from the application of this part Hindus, Mahomedans, Buddhists, Sikhs and Jains. But though these classes are excluded from the operation of the sections on domicile, in the absence of any other law governing the question of domicile, the principles laid down in the sections embodied in this part would be applied, see *Kashibai v. Shripat*, 19 Bom. 697; *Bhaurao v. Lakshmbai*, 20 Bom. 607.

Law regulating succession to deceased person's immovable and moveable property respectively. 5. (1) Succession to the immoveable property in British India of a person deceased shall be regulated by the law of British India, wherever such person may have had his domicile at the time of his death.

(2) Succession to the moveable property of a person deceased is regulated by the law of the country in which such person had his domicile at the time of his death.

Illustrations.

(i) A, having his domicile in British India, dies in France, leaving moveable property in France, moveable property in England, and property, both moveable and immoveable, in British India. The succession to the whole is regulated by the law of British India.

(ii) A, an Englishman, having his domicile in France, dies in British India, and leaves property, both moveable and immoveable, in British India. The succession to the moveable property is regulated by the rules which govern, in France, the succession to the moveable property of an Englishman dying domiciled in France, and the succession to the immoveable property is regulated by the law of British India.

(This is sec. 5 of the Succession Act X of 1865.)

One domicile only affects succession to moveables.

6. A person can have only one domicile for the purpose of the succession to his moveable property.

(This is sec. 6 of the Succession Act X of 1865.)

Domicile of origin of person of legitimate birth.

7. The domicile of origin of every person of legitimate birth is in the country in which at the time of his birth his father was domiciled; or, if he is a posthumous child, in the country in which his father was domiciled at the time of the father's death.

Illustration.

At the time of the birth of A, his father was domiciled in England. A's domicile of origin is in England, whatever may be the country in which he was born.

(This is sec. 7 of the Succession Act X of 1865.)

Domicile of origin of illegitimate child.

8. The domicile of origin of an illegitimate child is in the country in which, at the time of his birth, his mother was domiciled.

(This is sec. 8 of the Succession Act X of 1865.)

Continuance of domicile of origin.

9. The domicile of origin prevails until a new domicile has been acquired.

(This is sec. 9 of the Succession Act X of 1865.)

Acquisition of new domicile.

10. A man acquires a new domicile, by taking up his fixed habitation in a country which is not that of his domicile of origin.

Explanation.—A man is not to be deemed to have taken up his fixed habitation in British India merely by reason of his residing there in His Majesty's civil or military service, or in the exercise of any profession or calling.

Illustrations.

(i) A, whose domicile of origin is in England, proceeds to British India, where he settles as a barrister or a merchant, intending to reside there during the remainder of his life. His domicile is now in British India.

(ii) A, whose domicile is in England, goes to Austria, and enters the Austrian service, intending to remain in that service. A has acquired a domicile in Austria.

(iii) A, whose domicile of origin is in France, comes to reside in British India under an engagement with the Government of India for a certain number of years. It is his intention to return to France at the end of that period. He does not acquire a domicile in British India.

(iv) A, whose domicile is in England, goes to reside in British India for the purpose of winding up the affairs of a partnership which has been dissolved, and with the intention of returning to England as soon as that purpose is accomplished. He does not by such residence acquire a domicile in British India, however long the residence may last.

(v) A, having gone to reside in British India in the circumstances mentioned in the last preceding illustration, afterwards alters his intention, and takes up his fixed habitation in British India. A has acquired a domicile in British India.

(vi) A, whose domicile is in the French Settlement of Chandernagore, is compelled by political events to take refuge in Calcutta, and resides in Calcutta, for many years in the hope of such political changes as may enable him to return with safety to Chandernagore. He does not by such residence acquire a domicile in British India.

(vii) A, having come to Calcutta in the circumstances stated in the last preceding illustration, continues to reside there after such political changes have occurred as would enable him to return with safety to Chandernagore, and he intends that his residence in Calcutta shall be permanent. A has acquired a domicile in British India.

(This is sec. 10 of the Succession Act X of 1865.)

11. Any person may acquire a domicile in British India by making and depositing in some office in British India, appointed in this behalf by the Local Government, a declaration in writing under his hand of his desire to acquire such domicile; provided that he has been resident in British India for one year immediately preceding the time of his making such declaration.

(This is sec. 11 of the Succession Act X of 1865.)

12. A person who is appointed by the Government of one country to be its ambassador, consul or other representative in another country does not acquire a domicile in the latter country by reason only of residing there in pursuance of his appointment; nor does any other person acquire such domicile by reason only of residing with such first mentioned person as part of his family, or as a servant.

(This is sec. 12 of the Succession Act X of 1865.)

13. A new domicile continues until the former domicile has been resumed or another has been acquired.

(This is sec. 13 of the Succession Act X of 1865.)

14. The domicile of a minor follows the domicile of the parent from whom he derived his domicile of origin.

Exception.—The domicile of a minor does not change with that of his parent, if the minor is married or holds any office or employment in the service of His Majesty, or has set up, with the consent of the parent, in any distinct business.

(This is sec. 14 of the Succession Act X of 1865.)

15. By marriage a woman acquires the domicile of her husband, if she had not the same domicile before.

(This is sec. 15 of the Succession Act X of 1865.)

16. A wife's domicile during her marriage follows the domicile of her husband.

Exception.—The wife's domicile no longer follows that of her husband if they are separated by the sentence of a competent Court, or if the husband is undergoing a sentence of transportation.

(This is sec. 10 of the Succession Act X of 1865.)

Minor's acquisition
of new domicile.

17. Save as hereinbefore otherwise provided in this Part, a person cannot during minority acquire a new domicile.

(This is sec. 17 of the Succession Act X of 1865.)

Lunatic's acquisition
of new domicile.

18. An insane person cannot acquire a new domicile in any other way than by his domicile following the domicile of another person.

(This is sec. 18 of the Succession Act X of 1865.)

Succession to move-
able property in Bri-
tish India in absence
of proof of domicile
elsewhere.

19. If a person dies leaving moveable property in British India, in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of British India.

(This is sec. 19 of the Succession Act X of 1865.)

COMMENTARY.

Sections 5 and 19.—The question of Domicile of a person has to be determined for the purposes of the distribution of his *moveable* property when such person dies intestate, *i. e.*, without making a Will. The general rule is that the distribution of the moveable property of a person dying intestate is regulated by the law of the country in which the person had his domicile at the time of his death, without any regard to the place of his birth or death or the situation of the property. It is the domicile *at death* that governs the succession. Thus if a man dies domiciled in England the succession to his moveable property will be governed by the English law, and if he left a will the construction of such will, at least so far as it relates to his moveable property, and its execution wherever the will may have been executed, shall be according to the English law. Succession to the *immoveable property* of a person is regulated by the law of the country in which such property is situate, *i. e.*, by the *lex loci rei sitæ*, wherever the person may have had his domicile at the time of his death, *Bhaurao v. Lakshmbai*, 20 Bom. 607. Thus if a man domiciled in England possessing immoveable property in British India dies intestate the succession to it will be in accordance with the Indian Succession Act, and if he has made a will respecting the immoveable property in this country both its construction and execution must be in accordance with this Act.

In the absence of proof of any domicile elsewhere succession to the moveable property in British India of a person is regulated by the law of British India, sec. 19.

Section 5 applies in case of testacy as well as intestacy. Therefore, if a foreigner makes a will affecting immoveable property its execution must be in accordance with this Act; but in case of moveable property it would be sufficient if it is valid according to the law of domicile though it may not be valid according to this Act. *Bhaurao v. Lakshmbai, supra.*

There is, however, an exception to this rule in case of a foreign or feudatory state. If such a state holds immoveable property, and if there is no prohibition by International Law to such holding the rule laid down in sec. 5 does not apply. *Hajon Manick v. Bur Sing*, 11 Cal. 17.

Though the right to succession to the moveable property is to be regulated by the law of the domicile, still if a person whose domicile is not in British India dies leaving moveable property in British India, *the administration* of that property and its application towards the payment of his debts is to be regulated by the law of British India. The executors or administrators of such person in British India may, after discharging all the debts of the deceased, transfer and hand over the surplus or residue to the executors or administrators (if any) of the foreigner in the country of his domicile with their consent, instead of themselves distributing the surplus or residue to the persons entitled thereto. See sec. 367.

What is Domicile.—As the question of domicile plays such an important part in the distribution of the moveable property of a person it is essential to know what is meant by the expression "domicile." In its ordinary meaning domicile means the place where a man lives or has his home. Lord Wensleydale in *Whicker v. Hume*, 7 H. L. C. 164 gives the following definition: "Habitation (by a man) in a place with the intention of remaining there for ever unless some circumstances should occur to alter his intention." The domicile of a person is where he has his true fixed permanent home to which he intends returning. By permanent residence is meant the residence to which no definite limit of time can be assigned. Two things are essential to constitute domicile—(1) residence and (2) intention of making it the home.

Classification of Domicile.—Domicile has been classed under three heads—(1) By Birth, (2) By Choice, (3) By operation of Law.

(1) Domicile by Birth.—Secs. 6, 7, 8 and 9.—Though a man may have two domiciles for some purposes he can have only one for the purpose of succession to his moveable property. And it is also a settled principle that no man shall be without a domicile. The law attributes to every child as soon as he is born the domicile of his father if the child is legitimate and the domicile of his mother if the child is illegitimate. This is called "domicile by birth" or "original domicile." It is not in itself local, *i. e.*, by it is not meant the place of birth of the child for by mere accident a child may be born on a journey in a foreign country, but the country in which at the time of the birth of the child his father is domiciled, if the child is legitimate and, if the child is illegitimate, the country in which at the time of his birth his mother is domiciled. The place where the child was born is immaterial. The domicile of origin once ascertained in law clings and adheres to the person until he chooses to divest himself of it by substituting a domicile of choice for the domicile of origin. *Santos v. Pinto*, 41 Bom. 687.

(2) Domicile by Choice.—Secs. 10, 11, 12 and 13.—A domicile of choice is acquired by a combination of fact with intention. The fact is residence and the intention is that the residence should be permanent. It is the taking up of a fixed habitation that determines the acquisition of new domicile. A domicile of choice is the creation of the party. The domicile of origin is the creation of law, and, when a party creates a new domicile, the domicile of origin remains in abeyance. It is not extinguished. To constitute such a change of domicile it must be both *animo et facto*. Mere residence in a new place is not enough, it must be accompanied by an

intention of *permanently* residing in the new domicile with the intention of abandoning his domicile of origin, *Santos v. Pinto*, 41 Bom. 687. If the domicile of choice is abandoned without acquisition of another the domicile of origin revives without the need of any further act or intention on the part of the person. In *In Re Elliott*, 4 Cal. 106 a person who had entered in the service of the East India Co., continued in that service after the Act of 1858 transferring the Govt. of India from the East India Co., to Crown was passed died in 1878 leaving a holograph will which was not attested according to this Act but was valid according to Scotch Law. It was held that the deceased had acquired an Anglo-Indian domicile and the will was not valid.

Sec. 11 lays down a special mode for acquiring domicile in British India, *i. e.*, by making and depositing in some office in British India a *declaration* to acquire such domicile by a person who shall have been a resident in British India for *one year* immediately preceding the time of his making such declaration.

As above stated it is the taking up of fixed habitation that determines the fact of the acquisition of new domicile. Therefore sec. 12 enacts that if a person is appointed by the Government of one country to be its ambassador, consul, or other representative in another country he does not acquire a domicile in the latter country by reason only of residing there, nor do his family or servants acquire a new domicile by reason of their residing with him. An acquired domicile continues until the former domicile is resumed or another is acquired. The domicile of origin does not revive until the acquired domicile is abandoned and the former is resumed *animo et facto*. An acquired domicile cannot be lost by mere abandonment.

(3) **Domicile by Operation of Law.**—Secs. 14, 15, 16, 17 and 18.—Domicile by operation of law affects three classes: (a) A minor; (b) A married woman, and (c) A lunatic.

(a) **Minor's Domicile.**—Secs. 14-17.—The domicile of a minor follows that of his parent, *i. e.*, of the father if the minor is legitimate, and of the mother if the minor is illegitimate;

Except. (1) If the minor is married, or

(2) Holds any office or employment in the service of His Majesty, or

(3) Has set up, with the consent of the parent, in any distinct business.

(b) **Married Woman's Domicile.**—Secs. 15 and 16.—By marriage a woman acquires the domicile of her husband, if she had not the same domicile before. And during marriage the wife's domicile follows that of her husband.

Except. (1) Where the husband and wife are separated by the sentence of a competent Court, or

(2) If the husband is undergoing a sentence of transportation.

The widow retains the domicile of her husband after his death, unless she has changed it after his death, *Kashiba v. Shripat*, 19 Bom. 697.

The word "sentence" in section 16 means both a decree for divorce and a decree for judicial separation. *Dolphin v. Robins*, 7 H. L. C. 390, and after a decree for divorce the wife may select her own domicile, *MacLennan v. Edward*, (1911) 1 Ch. 578. But if the parties live separate under a deed of separation the exception will not apply. *Warrender v. Warrender*, 2 Cl. & F. 453.

(c) **Lunatic's Domicile.**—Sec. 18.—An insane person cannot acquire a new domicile in any other way than by his domicile following the domicile of another person's parent or if a lunatic.

Effect of Change of Domicile.—There is no provision made in this Act as to the effect of change of domicile on the will of a person. Under the English Wills Act, 1861, sec. 3, it is provided that "no will or other testamentary instrument shall be held to be revoked or to have become invalid nor shall the construction thereof be altered by reason of any subsequent change of domicile of the person making the same." This section applies to all wills whether of British subjects or aliens wherever made (see Mortimer on Probate p. 35). Severance from the domicile of origin and permanent residence in another place would effect a change of domicile and with it a change of law, e. g., from French to Anglo-Indian but it would not change the law of Succession, *Mahomed v. Khatubai*, 43 Bom. 647.

Onus of Proof.—As regards proof of acquisition of domicile of choice the length of residence is a very strong ground for inferring, in the absence of express intention an intention to make a residence a fixed habitation or permanent home. In every case it is a question of fact, though the decisions are varied and confusing (see *Santos v. Pinto*, 41 Bom. 687 where the subject is fully discussed). In the case of a person residing in India the onus lies on the party alleging foreign domicile to prove the domicile of origin. If once the domicile of origin is proved then it lies on the party alleging domicile of choice to prove the domicile of choice, *Bonnaud v. Emile*, 32 Cal. 631.

PART III.

Marriage.

20. (1) No person shall, by marriage, acquire any interest in the property of the person whom he or she marries or become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried.

Interests and powers not acquired nor lost by marriage.

(2) This Section—

- (a) shall not apply to any marriage contracted before the first day of January 1866.
- (b) shall not apply, and shall be deemed never to have applied, to any marriage one or both of the parties to which professed at the time of the marriage the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion.

Clause (1) of this section is sec. 4 of the Succession Act X of 1865. Clause 2 (a) & (b) is sec. 331 of the same Act. The section "shall not apply and shall be deemed never to have applied, to any marriage, one or both of the parties to which professed at the time of the marriage the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion," see the Married Woman's Property Act, 1874 (3 of 1874), s. 2, last paragraph, Genl. Acts, Vol. II. Sub clause (b) of clause (2) is taken from sec. 2 of the Married Woman's Property Act III of 1874 which section is repealed by this Act.

COMMENTARY.

This section (like the corresponding section of the old Act) is retrospective upto 1st January 1866 and leaves rights which had been acquired before that date unaffected, *Sarkies v. Prosonomoyee*, 6 Cal. 794. In that case it was held that the law of dower was recognised in India amongst Europeans and Armenians as a branch of the law of inheritance. This section and the following section are to be read together for ascertaining their combined effect on the rights in the property of a married woman.

21. If a person whose domicile is not in British India marries in British India a person whose domicile is in British India, neither party acquires by the marriage any rights in respect of any property of the other party not comprised in a settlement made previous to the marriage, which he or she would not acquire thereby if both were domiciled in British India at the time of the marriage.

Effect of marriage between person domiciled and one not domiciled in British India.

This is sec. 44 of the Succession Act X of 1865. It does not apply to Hindus, Muhamadans, Buddhists, Sikhs or Jains (see sec. 22 clause 2).

COMMENTARY.

The object in enacting secs. 4 and 44 of the old Act (to which these sections 20 and 21 correspond) was to alter completely the English law regarding a married woman's property and the disability under which a married woman was placed before the Married Women's Property Acts were passed. The law in England before the Married Women's Property Acts was as follows:—

(1) Personal chattels in possession belonging to the wife at the date of the marriage became absolutely vested in the husband by marriage, and he acquired the right to reduce into possession the wife's outstanding personal choses in action, that is, things to which the wife had a mere right enforceable by suit, *e.g.*, debts, moneys in the hands of third persons, etc. A married woman could not acquire any legal right to personal property during coverture.

(2) As to real estate the husband acquired during the marriage a freehold interest in his wife's real estate for their joint lives; and in the event of her death leaving children, subject to certain conditions and limitations, the husband became a tenant by curtesy.

Reference may here be usefully made to The Indian Married Woman's Property Act III of 1874. The recitals to the said Act are as follows:—

“And whereas by the Indian Succession Act, 1865, section 4, it is enacted that no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried:

And whereas by force of the said Act all women to whose marriages it applies are absolute owners of all property vested in, or acquired by them, and their husbands do not, by their marriage, acquire any interest in such property, but the

(c) **Lunatic's Domicile.**—Sec. 18.—An insane person cannot acquire a new domicile in any other way than by his domicile following the domicile of another person, *i. e.*, if the lunatic is a minor, his domicile follows that of his parent or if a lunatic is a married woman her domicile follows that of her husband.

Effect of Change of Domicile.—There is no provision made in this Act as to the effect of change of domicile on the will of a person. Under the English Wills Act, 1861, sec. 3, it is provided that "no will or other testamentary instrument shall be held to be revoked or to have become invalid nor shall the construction thereof be altered by reason of any subsequent change of domicile of the person making the same." This section applies to all wills whether of British subjects or aliens wherever made (see Mortimer on Probate p. 35). Severance from the domicile of origin and permanent residence in another place would effect a change of domicile and with it a change of law, *e. g.*, from French to Anglo-Indian but it would not change the law of Succession, *Mahomed v. Khatubai*, 43 Bom. 647.

Onus of Proof.—As regards proof of acquisition of domicile of choice the length of residence is a very strong ground for inferring, in the absence of express intention an intention to make a residence a fixed habitation or permanent home. In every case it is a question of fact, though the decisions are varied and confusing (see *Santos v. Pinto*, 41 Bom. 687 where the subject is fully discussed). In the case of a person residing in India the onus lies on the party alleging foreign domicile to prove the domicile of origin. If once the domicile of origin is proved then it lies on the party alleging domicile of choice to prove the domicile of choice, *Bonnaud v. Emile*, 32 Cal. 631.

PART III.

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Interests and powers not acquired nor lost by marriage.

(2) This Section—

(a) shall not apply to any marriage contracted before the first day of January 1866.

(b) shall not apply, and shall be deemed never to have applied, to any marriage one or both of the parties to which professed at the time of the marriage the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion.

Clause (1) of this section is sec. 4 of the Succession Act X of 1863. Clause 2 (a) & (b) is sec. 331 of the same Act. The section "shall not apply and shall be deemed never to have applied, to any marriage one or both of the parties to which professed at the time of the marriage the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion," see the Married Woman's Property Act, 1874 (3 of 1874), s. 2, last paragraph, Genl. Acts, Vol. II. Sub clause (b) of clause (2) is taken from sec. 2 of the Married Woman's Property Act III of 1874 which section is repealed by this Act.

COMMENTARY.

This section (like the corresponding section of the old Act) is retrospective upto 1st January 1866 and leaves rights which had been acquired before that date unaffected, *Sarkies v. Prosonomoyee*, 6 Cal. 794. In that case it was held that the law of dower was recognised in India amongst Europeans and Armenians as a branch of the law of inheritance. This section and the following section are to be read together for ascertaining their combined effect on the rights in the property of a married woman.

21. If a person whose domicile is not in British India marries in British India a person whose domicile is in British India, neither party acquires by the marriage any rights in respect of any property of the other party not comprised in a settlement made previous to the marriage, which he or she would not acquire thereby if both were domiciled in British India at the time of the marriage.

Effect of marriage between person domiciled and one not domiciled in British India

This is sec. 44 of the Succession Act X of 1865. It does not apply to Hindus, Muhammadans, Buddhists, Sikhs or Jains (see sec. 22 clause 2).

COMMENTARY.

The object in enacting secs. 4 and 44 of the old Act (to which these sections 20 and 21 correspond) was to alter completely the English law regarding a married woman's property and the disability under which a married woman was placed before the Married Women's Property Acts were passed. The law in England before the Married Women's Property Acts was as follows:—

(1) Personal chattels in possession belonging to the wife at the date of the marriage became absolutely vested in the husband by marriage, and he acquired the right to reduce into possession the wife's outstanding personal choses in action, that is, things to which the wife had a mere right enforceable by suit, e.g., debts, moneys in the hands of third persons, etc. A married woman could not acquire any legal right to personal property during coverture.

(2) As to real estate the husband acquired during the marriage a freehold interest in his wife's real estate for their joint lives; and in the event of her death leaving children, subject to certain conditions and limitations, the husband became a tenant by curtesy.

Reference may here be usefully made to The Indian Married Woman's Property Act III of 1874. The recitals to the said Act are as follows:—

“And whereas by the Indian Succession Act, 1865, section 4, it is enacted that no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried:

And whereas by force of the said Act all women to whose marriages it applies are absolute owners of all property vested in, or acquired by them, and their husbands do not, by their marriage, acquire any interest in such property, but the

said Act does not protect such husbands from liabilities on account of the debts of their wives contracted before marriage, and does not expressly provide for the enforcement of claims by or against such wives."

The combined effect of these enactments is to place a married woman governed by the Succession Act in the same position as an unmarried woman, i. e., she can sue or be sued of her husband and she

Sec. 7 of the Married Woman's Property Act 1874 runs as follows:—"A married woman may maintain a suit in her own name for the recovery of property of any description which by force of the said Indian Succession Act 1865 or of this Act is her separate property; and she shall have, in her own name, the same remedies, both civil and criminal, against all persons for the protection and security of such property as if she were unmarried, and she shall be liable to such suits, processes and orders in respect of such property as she would be liable to if she were unmarried." It should however be borne in mind that sections 20 and 21 of this Act relate to the immediate effect of marriage on the wife's property; but the order of succession to such property is not affected thereby, *Shapurji B. Motilal v. Dossabhoj B.* 11 Bom. 250. It will be seen from sections 15 and 16 of this Act that by

succession

Therefore

if a woman in India possessing moveable property marries a person of English domicile, the husband will not acquire any right over her property during their joint lives, but if she dies he would become entitled to the whole of her property to the exclusion of her children according to English law, *Miller v. Adm.-General*, 1 Cal. 412; *Hill v. Adm.-General*, 23 Cal. 506.

Illustration.

A having an English domicile marries a wife B having an Indian Domicile. B has moveable property of her own. A does not acquire any right over B's property. B dies leaving her husband A, a mother, and a brother. Under the Act the property would be divided as follows:—

Husband $\frac{1}{2}$, mother and brother $\frac{1}{2}$ equally (sec. 43). But succession to the moveable property of a deceased person is regulated by the law of the country of his domicile (sec. 5) and the wife B by marriage acquires her husband's domicile. In this case therefore, the succession will be according to the English law and under that law the husband will take the whole. (*Hill v. Administrator General*, 23 Cal. 506; *Miller v. Administrator-General*, 1 Cal. 412).

Restraint on Anticipation.—Allied to the law of Married Woman's Property is the equitable principle whereby a *femme covert*, i. e., a married woman, is restrained from alienating property settled for her benefit. This is known as the principle of "Restraint on Anticipation." It means restraint on alienation and is an exception established by equity in favour of married women to the general rule of law which regards conditions in transfers of property restraining alienation as null and void. Neither the Succession Act nor the Indian Married Woman's Property Act has abrogated this equitable principle, though at one time it was doubted, see *Hippolite v. Stuart*, 12 Cal. 522. This case however is dissented from in *Re Mantel and Mantel*, 18 Mad. 19 and Farran J. in *Cursetjee P. Tarachand v. Rustomjee*, 11 Bom. 348 declined to follow this decision and he held that the object of passing these Acts was to assimilate the position of a married woman to that of

an unmarried one so far as regards her dealings with her own property; but that section 8 of the Married Woman's Property Act renders a married woman liable *only to the extent of her separate property*. Sec. 8 of the Married Woman's Property Act is as follows:—

"If a married woman (whether married before or after the first day of January 1866) possesses separate property and if any person enters into a contract with her with reference to such property or on the faith that her obligation arising out of such contract will be satisfied out of her separate property such person shall be entitled to sue her, and, *to the extent of her separate property*, recover against her whatever he might have recovered in such suit had she been unmarried at the date of the contract and continued unmarried at the execution of the decree. Provided that nothing herein contained shall affect the liability of a husband for debts contracted by his wife's agency express or implied." This doctrine has been given statutory effect by section 10 of the Transfer of Property Act, which runs as follows:—"Where the property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: *Provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist) so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.*" It is only in case of a *married woman* that the law makes this exception. Therefore if a woman is unmarried at the date of the contract the law ordains that she cannot possess property subject to such condition, *Cursetjee P. Tarachand v. Rustomjee*, 11 Bom. 348. Accordingly in *Goudoin v. Venkatesa*, 30 Mad. 378 it was held that the income of property belonging to a married woman subject to a restraint on anticipation accruing due after the date of the decree against a married woman's separate property is not liable to attachment.

Hindus.—The provisions of the secs. 4, 5, 6, 7, 8 and 9 of the Married Woman's Property Act do not apply to Hindus, *Balamba v. Krishnayya*, 37 Mad. 483, *Shanker v. Umabai*, 15 Bom. L. R. 320.

Wife's Ornaments.—Ornaments are treated on a special footing. They comprise ornaments presented to the wife at the time of her marriage either by her parents and friends or by her husband's parents and friends and ornaments presented subsequent to marriage. As regards the latter they form a part of her moveable property. But as regards the former it was held in the case of *Byramjee v. Jamseljee*, 16 Bom. 630 that ornaments presented at marriage to a bride belonged to the husband and wife jointly during their life and on the death of either they belong absolutely to the survivor, see *Graham v. Londonderry*, 3 Atk. 393.

22. (1) The property of a minor may be settled in contemplation of marriage, provided the settlement is made by the minor with the approbation of the minor's father, or, if the father is dead or absent from British India, with the approbation of the High Court.

Settlement of minor's property in contemplation of marriage.

(2) Nothing in this section or in section 21 shall apply to any will made or intestacy occurring before the first day of January, 1866, or to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.

Clause (1) is sec. 45 and clause (2) is sec. 331 of the Succession Act X of 1865.

COMMENTARY.

This is an enabling section. A minor is incapable of dealing with his property. A minor cannot make a will. This section enables a minor's property to be settled on trust in the following case.

(a) If the settlement is in contemplation of marriage, and

(b) the settlement is made with the approbation of the minor's father or if he is dead or absent from British India with the approbation of the High Court. Both the conditions must be fulfilled.

PART IV.

Of Consanguinity.

23. Nothing in this Part shall apply to any will made or intestacy occurring before the first day of January, 1866, or to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi.

(This is sec. 331 of the Succession Act X of 1865, and sec. 8 of the Parsi Intestate Succession Act XXI of 1865.)

COMMENTARY.

The whole of this part applies to Europeans, Indian Christians, and other persons professing the Christian religion domiciled in British India.

24. Kindred or consanguinity is the connection or relation of persons descended from the same stock or common ancestor.

(This is sec. 20 of the Succession Act X of 1865.)

25. (1) Lineal consanguinity is that which subsists between two persons, one of whom is descended in a direct line from the other, as between a man and his father, grandfather and great-grandfather, and so upwards in the direct ascending line; or between a man and his son, grandson, great-grandson and so downwards in the direct descending line.

(2) Every generation constitutes a degree, either ascending or descending.

(3) A person's father is related to him in the first degree, and so likewise is his son; his grandfather and grandson in the second degree; his great-grandfather and great-grandson in the third degree, and so on.

(This is sec. 21 of the Succession Act X of 1865.)

26. (1) Collateral consanguinity is that which subsists between two persons who are descended from the same stock or ancestor, but neither of whom is descended in a direct line from the other.

Collateral consanguinity.

(2) For the purpose of ascertaining in what degree of kindred any collateral relative stands to a person deceased, it is necessary to reckon upwards from the person deceased to the common stock and then downwards to the collateral relative, a degree being allowed for each person, both ascending and descending.

(This is sec. 22 of the Succession Act X of 1865.)

Persons held for purpose of succession to be similarly related to deceased.

27. For the purpose of succession, there is no distinction—

(a) between those who are related to a person deceased through his father, and those who are related to him through his mother; or

(b) between those who are related to a person deceased by the full blood, and those who are related to him by the half blood; or

(c) between those who were actually born in the lifetime of a person deceased and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive.

(This is sec. 23 of the Succession Act X of 1865.)

28. Degrees of kindred are computed in the manner set forth in the table of kindred set out in Schedule I.

Mode of computing of degrees of kindred.

Illustrations.

(i) The person whose relatives are to be reckoned, and his cousin-german, or first cousin, are, as shown in the table, related in the fourth degree; there being one degree of ascent to the father, and another to the common ancestor, the grandfather; and from him one of descent to the uncle, and another to the cousin-german, making in all four degrees.

(ii) A grandson of the brother and a son of the uncle, i. e., a great-nephew and a cousin-german, are in equal degree, being each four degrees removed.

(iii) A grandson of a cousin-german is in the same degree as the grandson of a great uncle, for they are both in the sixth degree of kindred.

(This is in clause (1) of the Succession Act X of 1865, the illustrations are clauses 2, 3 & 4 of that section.)

COMMENTARY.

The relationship mentioned in these sections is the relationship flowing from lawful wedlock, *Smith v. Massey*, 30 Bom. 500, 8 Bom. L. R. 322.

Husband and wife are not next-of-kin of each other, *Watt v. Watt*, 3 Ves 247; *Administrator-General v. Simpson*, 26 Mad. 532. But when a bequest is made to the next-of-kin of a person the bequest will be distributed as if that person had died intestate and the widow will be entitled to a share. Under the English Law it would not be so, *Halton v. Foster*, L.R. 3 Ch. 505.

Mode of calculating Degrees.—In case of lineal consanguinity every generation counts a degree ascending or descending. In case of collateral consanguinity the rule is to count upwards from the person deceased to the common stock and then downwards to the collateral relative, reckoning a degree for each person both ascending and descending; or, in other words to take the sum of the degrees in both lines to the common ancestor. It must be noted that in counting the degrees the *propositus* is to be excluded, *e.g.*, a man's son or father is related to him in the first degree, a man's first cousin in the fourth degree.

PART V.

Intestate Succession.

CHAPTER I.

Preliminary.

29. (1) This Part shall not apply to any intestacy occurring before the first day of January, 1866, or to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.

Application of Part.

(2) Save as provided in sub-section (1) or by any other law for the time being in force, the provisions of this Part shall constitute the law of British India in all cases of intestacy.

(This is sec. 2 and 331 of the Succession Act X of 1865)

COMMENTARY.

The whole of this part applies to Europeans, Indian Christians, and other persons professing Christian religion domiciled in British India and to Parsis.

30. A person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

As to what property deceased considered to have died intestate.

Illustrations.

- (i) A has left no will. He has died intestate in respect of the whole of his property.
- (ii) A has left a will, whereby he has appointed B his executor; but the will contains no other provisions. A has died intestate in respect of the distribution of his property.

(iii) A has bequeathed his whole property for an illegal purpose. A has died intestate in respect of the distribution of his property.

(iv) A has bequeathed 1,000 rupees to B and 1,000 rupees to the eldest son of C, and has made no other bequest; and has died leaving the sum of 2,000 rupees and no other property. C died before A without having ever had a son. A has died intestate in respect of the distribution of 1,000 rupees.

(This is sec. 25 of the Succession Act X of 1865.)

COMMENTARY.

What is Intestacy.—A man is considered to die intestate in respect of all property of which

(1) He has not made a testamentary disposition, *e. g.*, when he has left no Will.

(2) He has made a Will but the Will is not capable of taking effect, *e. g.*, when he has bequeathed his whole property for an illegal purpose.

A man may die partly testate and partly intestate, *e. g.*, where the Will contains several bequests to several legatees, but there is no disposition of the residue, he dies intestate as regards the residue, *Erasha v. Jerbai*, 4 Bom. 537.

CHAPTER II.

Rules in cases of Intestates other than Parsis.

Chapter not to
apply to Parsis. **31.** Nothing in this Chapter shall apply to Parsis.

(This is sec. 8 of the Parsi Intestate Succession Act XXI of 1865.)

COMMENTARY.

This chapter applies to Europeans and Indian Christians only and lays down the shares of the next of kin of the deceased in cases of intestacy.

32. The property of an intestate devolves upon the wife or husband, or upon those who are of the kindred of the deceased, in the order and according to the rules hereinafter contained in this Chapter.

Devolution of such
property.

Explanation.—A widow is not entitled to the provision hereby made for her if, by a valid contract made before her marriage, she has been excluded from her distributive share of her husband's estate.

(This is sec. 28 of the Succession Act X of 1865.)

COMMENTARY.

The *Explanation* to this section has reference to the doctrine of English law whereby the widow's right to participate in the personal property of her husband may be validly barred by a settlement executed before marriage. The *Explanation* gives statutory effect to the same principle. The settlement must be ante-nuptial and not post-nuptial.

COMMENTARY.

The relationship mentioned in these sections is the relationship flowing from lawful wedlock, *Smith v. Massey*, 30 Bom. 500, 8 Bom. L. R. 322.

Husband and wife are not next-of-kin of each other, *Watt v. Watt*, 3 Ves 247; *Administrator-General v. Simpson*, 26 Mad. 532. But when a bequest is made to the next-of-kin of a person the bequest will be distributed as if that person had died intestate and the widow will be entitled to a share. Under the English Law it would not be so, *Halton v. Foster*, L.R. 3 Ch. 505.

Mode of calculating Degrees.—In case of lineal consanguinity every generation counts a degree ascending or descending. In case of collateral consanguinity the rule is to count upwards from the person deceased to the common stock and then downwards to the collateral relative, reckoning a degree for each person both ascending and descending; or, in other words to take the sum of the degrees in both lines to the common ancestor. It must be noted that in counting the degrees the propositus is to be excluded, *e.g.*, a man's son or father is related to him in the first degree, a man's first cousin in the fourth degree.

PART V.

Intestate Succession.

CHAPTER I.

Preliminary.

29. (1) This Part shall not apply to any intestacy occurring before the first day of January, 1866, or to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.

Application of Part.

(2) Save as provided in sub-section (1) or by any other law for the time being in force, the provisions of this Part shall constitute the law of British India in all cases of intestacy.

(This is sec. 2 and 331 of the Succession Act X of 1865)

COMMENTARY.

The whole of this part applies to Europeans, Indian Christians, and other persons professing Christian religion domiciled in British India and to Parsis.

30. A person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

Illustrations.

(i) A has left no will. He has died intestate in respect of the whole of his property.

(ii) A has left a will, whereby he has appointed B his executor; but the will contains no other provisions. A has died intestate in respect of the distribution of his property.

As to what property deceased considered to have died intestate.

(iii) A has bequeathed his whole property for an illegal purpose. A has died intestate in respect of the distribution of his property.

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(This is sec. 25 of the Succession Act X of 1865.)

COMMENTARY.

What is Intestacy.—A man is considered to die intestate in respect of all property of which

(1) He has not made a testamentary disposition, *e. g.*, when he has left no Will.

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A man may die partly testate and partly intestate, *e. g.*, where the Will contains several bequests to several legatees, but there is no disposition of the residue, he dies intestate as regards the residue, *Erasha v. Jerbai*, 4 Bom. 537.

CHAPTER II.

Rules in cases of Intestates other than Parsis.

Chapter not to
apply to Parsis. **31.** Nothing in this Chapter shall apply to Parsis.

(This is sec. 3 of the Parsi Intestate Succession Act XXI of 1865.)

COMMENTARY.

This chapter applies to Europeans and Indian Christians only and lays down the shares of the next of kin of the deceased in cases of intestacy.

32. The property of an intestate devolves upon the wife or husband, or upon those who are of the kindred of the deceased, in the order and according to the rules hereinafter contained in this Chapter.

Devolution of such
property.

Explanation.—A widow is not entitled to the provision hereby made for her if, by a valid contract made before her marriage, she has been excluded from her distributive share of her husband's estate.

(This is sec. 26 of the Succession Act X of 1865.)

COMMENTARY.

The *Explanation* to this section has reference to the doctrine of English law whereby the widow's right to participate in the personal property of her husband may be validly barred by a settlement executed before marriage. The *Explanation* gives statutory effect to the same principle. The settlement must be ante-nuptial and not post-nuptial.

Where intestate has left widow and lineal descendants, or widow and kindred only, or widow and no kindred.

33. Where the intestate has left a widow—

(a) If he has also left any lineal descendants, one-third of his property shall belong to his widow, and the remaining two-thirds shall go to his lineal descendants, according to the rules hereinafter contained;

(b) if he has left no lineal descendant, but has left persons who are of kindred to him, one-half of his property shall belong to his widow, and the other half shall go to those who are of kindred to him, in the order and according to the rules hereinafter contained;

(c) if he has left none who are of kindred to him, the whole of his property shall belong to his widow.

(This is sec. 27 of the Succession Act X of 1865.)

34. Where the intestate has left no widow, his property shall go to his lineal descendants or to those who are of kindred to him, not being lineal descendants, according to the rules hereinafter contained; and, if he has left none who are of kindred to him, it shall go to the Crown.

Where intestate has left no widow, and where he has left no kindred.

(This is sec. 28 of the Succession Act X of 1865.)

COMMENTARY.

Widow's Share.—

- (1) Widow and children = widow $\frac{1}{3}$, children $\frac{2}{3}$.
- (2) Widow and no children but next of kin = widow $\frac{1}{2}$, next of kin $\frac{1}{2}$.
- (3) Widow, no children and no next of kin = widow whole.

The first and second rules agree with the law in England. But the third departs from it where the widow is not entitled to the whole but only to half and the other half goes to the Crown.

35. A husband surviving his wife has the same rights in respect of her property, if she dies intestate, as a widow has in respect of her husband's property, if he dies intestate.

Rights of widower.

(This is sec. 43 of the Succession Act X of 1865.)

COMMENTARY.

Husband's Share.—

- (1) Husband and children = husband $\frac{1}{3}$, children $\frac{2}{3}$.
- (2) Husband and next of kin = husband $\frac{1}{2}$, next of kin $\frac{1}{2}$.
- (3) Husband alone = whole.

Distribution when there are lineal descendants.

36. The rules for the distribution of the intestate's property (after deducting the widow's share, if he has left a widow) amongst his lineal descendants shall be those contained in sections 37 to 40.

(This is sec. 29 of the Succession Act X of 1865.)

Rules of distribution.

37. Where the intestate has left surviving him a child or children, but no more remote lineal descendant through a deceased child, the property shall belong to his surviving child, if there is only one, or shall be equally divided among all his surviving children.

Where intestate has left child or children only.

(This is sec. 30 of the Succession Act X of 1865.)

38. Where the intestate has not left surviving him any child, but has left a grandchild or grandchildren, and no more remote descendant through a deceased grandchild, the property shall belong to his surviving grandchild if there is only one, or shall be equally divided among all his surviving grandchildren.

Where intestate has left no child, but grandchild or grandchildren.

Illustrations.

(i) A has three children, and no more, John, Mary and Henry. They all die before the father, John leaving two children, Mary three, and Henry four. Afterwards A dies intestate, leaving those nine grandchildren and no descendant of any deceased grandchild. Each of his grandchildren will have one-ninth.

(ii) But if Henry has died, leaving no child, then the whole is equally divided between the intestate's five grandchildren, the children of John and Mary.

(This is sec. 31 of the Succession Act X of 1865. Illustration (c) of that section is omitted and is transposed to sec. 40, illustration (iv).)

39. In like manner the property shall go to the surviving lineal descendants who are nearest in degree to the intestate, where they are all in the degree of great-grandchildren to him, or are all in a more remote degree.

(This is sec. 32 of the Succession Act X of 1865.)

Where intestate has left only great-grandchildren or remoter lineal descendants

40. (i) If the intestate has left lineal descendants who do not all stand in the same degree of kindred to him, and the persons through whom the more remote are descended from him are dead, the property shall be divided into such a number of equal shares as may correspond with the number of the lineal descendants of the intestate who either stood in the nearest degree of kindred

Where intestate leaves lineal descendants not all in same degree of kindred to him, and those through whom the more remote are descended are dead.

to him at his decease, or, having been of the like degree of kindred to him, died before him, leaving lineal descendants who survived him.

(2) One of such shares shall be allotted to each of the lineal descendants who stood in the nearest degree of kindred to the intestate at his decease; and one of such shares shall be allotted in respect of each of such deceased lineal descendants; and the share allotted in respect of each of such deceased lineal descendants shall belong to his surviving child or children or more remote lineal descendants, as the case may be; such surviving child or children or more remote lineal descendants always taking the share which his or their parent or parents would have been entitled to respectively if such parent or parents had survived the intestate.

Illustrations.

(i) A had three children, John, Mary and Henry; John died, leaving four children, and Mary died, leaving one, and Henry alone survived the father. On the death of A, intestate, one-third is allotted to Henry, one-third to John's four children, and the remaining third to Mary's one child.

(ii) A left no child, but left eight grandchildren, and two children of a deceased grandchild. The property is divided into nine parts, one of which is allotted to each grandchild, and the remaining one-ninth is equally divided between the two great-grandchildren.

(iii) A has three children, John, Mary and Henry; John dies leaving four children; and one of John's children dies leaving two children. Mary dies leaving one child. A afterwards dies intestate. One-third of his property is allotted to Henry, one-third to Mary's child, and one-third is divided into four parts, one of which is allotted to each of John's three surviving children, and the remaining part is equally divided between John's two grandchildren.

(iv) A has two children, and no more John and Mary. John dies before his father, leaving his wife pregnant. Then A dies leaving Mary surviving him, and in due time a child of John is born. A's property is to be equally divided between Mary and the posthumous child.

(This is sec. 33 of the Succession Act X of 1865, illustration (iv) is illustration (c) of sec. 31 of that Act.)

Distribution where there are no lineal descendants.

Rules of distribution where intestate has left no lineal descendants.

41. Where an intestate has left no lineal descendants, the rules for the distribution of his property (after deducting the widow's share, if he has left a widow) shall be those contained in sections 42 to 48.

(This is sec. 34 of the Succession Act X of 1865.)

Where intestate's father living.

42. If the intestate's father is living, he shall succeed to the property.

(This is sec. 35 of the Succession Act X of 1865.)

Where intestate's father dead, but his mother, brothers and sisters living.

the mother and each living brother or sister shall succeed to the property in equal shares.

43. If the intestate's father is dead, but the intestate's mother is living, and there are also brothers or sisters of the intestate living, and there is no child living of any deceased brother or sister,

Illustration.

A dies intestate, survived by his mother and two brothers of the full blood, John and Henry, and a sister Mary, who is the daughter of his mother, but not of his father. The mother takes one-fourth, each brother takes one-fourth, and Mary, the sister of half blood, takes one-fourth.

(This is sec. 36 of the Succession Act X of 1865.)

Where intestate's father dead and his mother, a brother or sister, and children of any deceased brother or sister, living.

44. If the intestate's father is dead, but the intestate's mother is living, and if any brother or sister and the child or children of any brother or sister who may have died in the intestate's lifetime are also living, then the mother and each living brother or sister, and the living child or children of each deceased brother or sister, shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Illustration.

A, the intestate, leaves his mother, his brothers John and Henry, and also one child of a deceased sister, Mary, and two children of George, a deceased brother of the half blood who was the son of his father but not of his mother. The mother takes one-fifth, John and Henry each takes one-fifth, the child of Mary takes one-fifth, and the two children of George divide the remaining one-fifth equally between them.

(This is sec. 37 of the Succession Act X of 1865.)

Where intestate's father dead and his mother and children of any deceased brother or sister living.

45. If the intestate's father is dead, but the intestate's mother is living, and the brothers and sisters are all dead, but all or any of them have left children who survived the intestate, the mother and the child or children of each deceased brother or sister shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Illustration.

A, the intestate, leaves no brother or sister, but leaves his mother and one child of a deceased sister Mary, and two children of a deceased brother George. The mother takes one-third, the child of Mary takes one-third, and the children of George divide the remaining one-third equally between them.

(This is sec. 38 of the Succession Act X of 1865)

NOTE.—In this case all the children of the testator are dead but he leaves a widow, four grandchildren and five great-grandchildren. The widow will take the one-third and the two-thirds will be divided into six parts as there are six grandchildren (four living and two dead), each grand child taking one-ninth; the respective shares of the deceased grandchildren will go to their children equally. Observe, that in this case the *stirpes* or root is the grandchildren and not the children as all the children are dead. If any child of A were living, the root would be the children. (See illustration (iv) sec. 40).

The rule in England seems to be different. See in *Re Ross's Trust*, L. R., 13 Eq. 286, where the share is calculated according to the number of children and not with reference to the number of grandchildren as in the above case.

Part II.—No Lineal Descendants, but other Kindred.

NOTE.—The other kindred, i. e., father, mother, brothers, sisters, etc. only take a share when the intestate leaves no lineal descendants, i. e., when there is no child, grandchild, etc. If there is a child, grandchild, etc. father, mother, etc. do not take any share.

NOTE.—(1) If there is no child, grandchild or any other lineal descendant the widow's share is $1/2$ which is to be deducted first.

(2) If the intestate (female) leaves a husband his share $1/2$ is to be deducted first.

(1) Father { Whole (i. e., after deducting the widow's or husband's one half share).

NOTE.—Father excludes any other kindred. *Administrator-General v. Anandachari*, 9 Mad. 466.

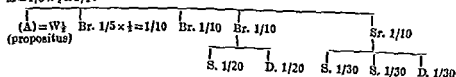
(2) Mother, brothers, and sisters only, } Equally.

Note.—Section 44 speaks of brothers or sisters but the meaning is made clear from the illustrations that both brothers and sisters share, *Nepenbala v. Sitikantha*, 15 C W. N. 158.

(3) Mother, brothers, sisters, and also the child or children of any deceased brother or sister. } Equally, the child or children of any predeceased brother or sister taking only and *inter se* equally their parent's share.

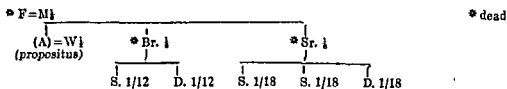
Illustration.

$$M = 1/5 \times \frac{1}{2} = 1/10$$



(4) Mother, and children of deceased brothers and sisters only. } Equally *per stirpes*, i. e., the children of deceased brothers and sisters taking and *inter se* equally their respective parent's share.

Illustration.



- (5) Mother *only*, i. e., no brothers, no sisters, no child of any brother's or sister's. } Mother whole (i. e., after deducting the widow or husband's $\frac{1}{2}$ share).
- (6) Brothers, sisters, and children of deceased brothers and sisters. } Equally *per stirpes*, i. e., the children of deceased brothers and sisters take and *inter se* equally their respective parent's share.
- (7) Remote Kindred ... { (1) One who is nearer in degree is preferred to one who is more remote, whether male or female.
(2) If there are several persons of the same degree of kindred to the intestate, they share equally, whether male or female.

NOTE.—The representation is to be carried up to the children of brothers and sisters and not beyond. If there are no children of brothers and sisters the rule is to count the number of degree of relationship.

Illustrations.

- | | | | |
|------------------------------|---------------------------------|--|---------------------------------|
| (1) Widow,
$\frac{1}{2}$ | children,
$\frac{1}{2}$ | father
(takes nothing). | |
| (2) Widow,
$\frac{1}{2}$ | father,
$\frac{1}{2}$ | mother
(takes nothing). | |
| (3) Widow,
$\frac{1}{2}$ | mother,
$\frac{1}{2}$ | grandfather
(takes nothing). | |
| (4) Widow,
$\frac{1}{2}$ | one brother,
$\frac{1}{2}$ | two children of a
deceased sister,
$\frac{1}{2}$ (equally) | grandfather
(takes nothing). |
| (5) Mother,
$\frac{1}{2}$ | brother,
$\frac{1}{2}$ | sister
$\frac{1}{2}$ | |
| (6) Mother,
$\frac{1}{2}$ | brother's son,
$\frac{1}{2}$ | sister's son,
$\frac{1}{2}$ | grandfather
(takes nothing). |

NOTE.—Here the brother's and sister's son, though of lower degree than the grandfather, are preferred. See note above.

- | | | |
|-----------------------------|---|-------------------------------|
| (7) Widow,
$\frac{1}{2}$ | brother's grandson,
(takes nothing, grandfather
is of nearer degree). | grandfather,
$\frac{1}{2}$ |
|-----------------------------|---|-------------------------------|

5 B. H. C. 194. It was accordingly held in *Shapurji v. Dossabhai*, 30 Bom. 359 that before the passing of Act X of 1865, a Parsi husband did not acquire that particular right which in English law accrued to a husband over his wife's personalty. In *Maneckbai v. Meherbai*, 6 Bom. 363 the Statute of Frauds was applied to Parsis. In *Payne & Co. v. Pirojshah*, 13 Bom. L. R. 920, it was held that the Common Law of England applied to Parsis in the town and island of Bombay. In *Byramjee v. Jamsetjee*, 16 Bom. 630 it was held that the ornaments presented at marriage to a bride belonged to the husband and wife jointly during their life and on the death of either they passed absolutely to the survivor.

50. Where a Parsi dies leaving a widow and children, the property of which he dies intestate shall be divided among the widow and children, so that the share of each son shall be double the share of the widow, and that her share shall be double the share of each daughter.

Division of property
among widow and
children of intestate

(This is sec. 1 of the Parsi Intestate Succession Act.)

51. Where a female Parsi dies leaving a widower and children, the property of which she dies intestate shall be divided among the widower and such children, so that his share shall be double the share of each of the children.

Division of property
among widower and
children of intestate.

(This is sec. 2 of the Parsi Intestate Succession Act.)

52. When a Parsi dies leaving children, but no widow, the property of which he dies intestate shall be divided amongst the children, so that the share of each son shall be four times the share of each daughter.

Division of property
amongst the children
of male intestate who
leaves no widow.

(This is sec. 3 of the Parsi Intestate Succession Act.)

53. When a female Parsi dies leaving children but no widower, the property of which she dies intestate shall be divided amongst the children in equal shares.

Division of property
amongst the children
of female intestate
who leaves no wi-
dower.

(This is sec. 4 of the Parsi Intestate Succession Act.)

COMMENTARY.

A. Share in Husband's Property.—

(a) When he has left a widow and children—daughter, widow, son,

1 2 4

(b) When he has left no widow but children—daughter, son

1 4

B. Share in Wife's Property.—

(a) When she has left widower and children—widower, child,

2 1

(b) When she has left no widower but children—children equally.

(c) Widow or widower $\frac{1}{2}$; Grandfather and Grandmother $\frac{1}{2}$ in the proportion of 2 to 1.

(d) Widow or widower $\frac{1}{2}$; Grandfather's sons and daughters $\frac{1}{2}$ in the proportion of 2 to 1.

NOTE—Children of predeceased son and daughter take their parent's share.

(e) Widow or widower $\frac{1}{2}$; Great-Grandfather and Great-Grandmother $\frac{1}{2}$ in the proportion of 2 to 1.

(f) Widow or widower $\frac{1}{2}$; Great-Grandfather's sons and daughters $\frac{1}{2}$ in the proportion of 2 to 1.

NOTE:—Children of predeceased son and daughter take their parent's share.

(g) Widow or widower and no relative on father's side, widow or widower takes the whole.

56. When a Parsi dies leaving neither lineal descendants nor a widow or widower, his or her next-of-kin, in the order set forth in Part II of Schedule II, shall be entitled to succeed to the whole of the property as to which he or she dies intestate. The next-of-kin standing first in Part II of the same Schedule shall be preferred to those standing second, the second to the third, and so on in succession, provided that the property shall be so distributed as that each male shall take double the share of each female standing in the same degree of propinquity.

(This is sec. 7 of the *Parsi Intestate Succession Act.*)

COMMENTARY.

Division of Intestate's Property when there is no widow or widower nor lineal descendants.

(1) Father and Mother in the proportion of 2 to 1.

(2) Brothers and Sisters in the proportion of 2 to 1.

NOTE.—Lineal descendants of predeceased brother and sister take their parent's share. *Hirjibhai v. Barjorji*, 22 Bom. 909.

(3) Paternal grandfather and paternal grandmother in the proportion of 2 to 1.

(4) Children of the paternal grandfather and the lineal descendants of such of them as shall have predeceased the intestate.

(5) Paternal grandfather's father and mother in the proportion of 2 to 1.

(6) Paternal grandfather's father's children, and the lineal descendants of such of them as shall have predeceased the intestate.

Father's line.

Division of property when the intestate leaves neither widow nor widower, nor lineal descendants.

Mother's line.

- (7) Brothers and sisters by the mother's side, and the lineal descendants of such of them as shall have predeceased the intestate.
- (8) Maternal grandfather and maternal grandmother.
- (9) Children of the maternal grandfather, and the lineal descendants of such of them as shall have predeceased the intestate.

- (10) Son's widow, if she has not remarried at or before the death of the intestate.
- (11) Brother's widow, if she has not remarried at or before the death of the intestate.
- (12) Paternal grandfather's son's widow, if she has not remarried at or before the death of the intestate.
- (13) Maternal grandfather's son's widow, if she has not remarried at or before the death of the intestate.

- (14) Widowers of the intestate's deceased daughters, if they have not remarried at or before the death of the intestate.
- (15) Maternal grandfather's father and mother.
- (16) Children of the maternal grandfather's father, and the lineal descendants of such of them as have predeceased the intestate.

- (17) Paternal grandfather's father and mother.
- (18) Children of the paternal grandfather's father, and the lineal descendants of such of them as have predeceased the intestate.

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Application of cer-
tain provisions of Part
to a class of wills made
by Hindus, etc.

(a) to all wills and codicils made by any Hindu, Buddhist, Sikh, or Jaina, on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such wills and codicils made outside those territories and limits so far as relates to immovable property situate within those territories or limits.—

Provided that marriage shall not revoke any such will or codicil.

(This is sec. 2 of the Hindu Wills Act XXI of 1870. The proviso is sec. 2 of the same Act. Schedule III is sec. 1, sec. 3, and sec. 6 of the same Act.)

COMMENTARY.

The whole of Part VI deals with testaments, and the sections comprised therein are from sec. 57 to 191. It is divided into 23 chapters. The subjects comprised are the making of wills, revocation of wills, rules of construction, and bequests.

58. (1) The provisions of this Part shall not apply to testamentary succession to the property of any Muhammadan nor, save as provided by section 57, to testamentary succession to the property of any Hindu, Buddhist, Sikh or Jaina; nor shall they apply to any will made before the first day of January, 1866.

General applica-
tion of Part

(2) Save as provided in sub-section (1) or by any other law for the time being in force, the provisions of this Part shall constitute the law of British India applicable to all cases of testamentary succession.

(This is sec. 2 of the Succession Act X of 1865.)

COMMENTARY.

This section leaves the law relating to testaments and testamentary succession as it was before the passing of this Act. The Succession Act of 1865 did not apply to Hindus and Muhammadans and this Act similarly exempts them from the application of the rules of testamentary succession. As regards Hindus governed by the Hindu Wills Act, this Act leaves them in the same condition. Accordingly, the rules governing testamentary succession embodied in this Part applies to Europeans and Parsis in their entirety.

CHAPTER II.

Of Wills and Codicils.

Person capable of
making wills.

59. Every person of sound mind not being a minor may dispose of his property by will.

Explanation 1.—A married woman may dispose by will of any property which she could alienate by her own act during her life.

Explanation 2.—Persons who are deaf or dumb or blind are not thereby incapacitated for making a will if they are able to know what they do by it.

Explanation 3.—A person who is ordinarily insane may make a will during an interval in which he is of sound mind.

Explanation 4.—No person can make a will while he is in such a state of mind, whether arising from intoxication, or from illness, or from any other cause, that he does not know what he is doing.

Illustrations.

- (1) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the persons who are of kindred to him, or in whose favour it would be proper that he should make his will. A cannot make a valid will.
 - (ii) A executes an instrument purporting to be his will, but he does not understand the nature of the instrument nor the effect of its provisions. This instrument is not a valid will.
 - (iii) A, being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property, makes a will. This is a valid will.
- (This is sec. 46 of the Succession Act X of 1865 except that in explanation (4) the word "intoxication" is substituted for the word "drunkenness.")

COMMENTARY.

(See next section.)

60. A father, whatever his age may be, may by will appoint a guardian or guardians for his child during minority.

(This is sec. 47 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus who were formerly governed by the Hindu Will Act.)

COMMENTARY.

Persons Capable of Making Wills.—(1) Every person of sound mind and not a minor may dispose of his property by will. Generally speaking, therefore, all persons who have sufficient discretion and free will are capable of disposing of their property by will. There are three grounds of incapacity: (a) the want of sufficient legal discretion; (b) the want of liberty or free-will; and (c) criminal conduct of the party. (Williams on Executors, 10th Edn. p. 8.)

Sound and Disposing Mind.—"In order to constitute a sound and disposing mind," said Erskine J. in *Harwood v. Baker*, 3 Moo. P. C. 282 at 290, "a testator must not only be able to understand that he is by his will giving the whole of his property to an object of his regard but he must also have capacity to comprehend the extent of his property and the nature of the claims of others whom by his will he is excluding from all participation in that property and the protection of the law is in no case more needed than in those where the mind has been too much enfeebled to comprehend more objects than one." Mere ability to sign one's name, nor mere consciousness, nor the fact that the testator was able to maintain ordinary conversation and to answer familiar and easy questions is enough to constitute a sound and disposing mind. *Surendra v. Rani Dass*, 47 Cal. 1043; *Susil Kumar v. Aparajit*, 19 C. W. N. 826. The testator must be capable of disposing of his property with understanding and reason. *Musait. Padam v. Dharm Das*, 15 C. W. N. 728. He must be able to appreciate his property, to form a judgment with respect to the parties whom he chooses to benefit by it after his death. *Surendra Krishna v. Sm. Rames Dass*, 24 C. W. N. 860. The question of sound and disposing mind is a question of fact and of degree of mental capacity in each case. If a testator while in a state of health gives instructions for a will and it is prepared in accordance with

during a lucid interval. As regards Wills made by lunatics during lucid intervals considerable difficulty arises as to the proof of a lucid interval and what amount of proof is necessary to establish the Will. The following is a brief summary of the case law on the subject :—

Generally speaking every person is presumed to be sane until he is proved to be insane. Whenever, therefore, a Will is produced which on the face of it is validly executed, the Court will presume that the testator was sane. If any party alleges that the testator was insane, the onus of proof will be on him. If the latter party adduces sufficient proof that the testator was habitually insane, the Will will be bad, unless the other party can show that the Will was executed during a lucid interval. If the testator was habitually insane, proof that the will was executed during a lucid interval will be a matter of extreme difficulty, as it will have to be proved by very clear and satisfactory evidence. If, however, the testator is affected by temporary insanity proof of a lucid interval will not be so very difficult, *e. g.*, the case of persons affected with insane delusions. "The strongest and best proof that can arise as to a lucid interval is that which arises from the act itself of making the Will..... and if it can be proved and established that it is a rational act, rationally done, the whole case is proved," *Cartwright v. Cartwright*, 1 Phillim. 122. It is not necessary to prove that the testator was sane for a day, an hour, or a minute, the length of a lucid interval is immaterial provided the making of the Will is the act of a rational being, that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, *Harwood v. Baker*, 3 Moo. P. C. 282.

Delirium and Insanity.—Delirium is a fluctuating state of mind created by temporary excitement in the absence of which the patient is most commonly really sane and the difficulty of proving a lucid interval is less. In order to constitute insane delusion it must be shown that the testator's belief in it was unfounded but that it was so destitute of foundation that no one except an insane person would have entertained it, *Sajid Ali v. Ibad Ali*, 22 I. A. 171. In the leading case of *Dew v. Clarke*, 3 Add 79, the testator had an insane aversion to his daughter and labouring under that delusion he willed away his property to a stranger. It was held that the Will was bad. But the mere existence of a delusion or a partial unsoundness of mind, not affecting the general faculties and not affecting the mind of the testator in regard to testamentary disposition, will not be sufficient to deprive a person of the power of disposing of his property, *Broughton v. Knight*, L. R. 3 P. and D. 64; *Banks v. Goodfellow*, L. R. 5, Q. B. 549. The result is that a person subject to delusions may make a valid Will; if the delusions under which he labours be such that they could not be supposed to have affected the dispositions made by the Will. (Williams on Executors, 10th Edn. pp. 14-25). Leading cases on insanity are, *Cartwright v. Cartwright*, 1 Phillim. 90; *Warring v. Warring*, 6 Moo. P. C.; *Banks v. Goodfellow*, L. R. 5, Q. B. 549; *Dew v. Clarke*, 1 Add. 279; see Taylor's Medical Jurisprudence; see also *Shunmugaroya v. Manikka Mudaliar*, 32 Mad. 400, 36 I. A. 185.

Eccentricity.—The will of an eccentric man is not to be put on the same footing as the will of a lunatic. There is a distinction between insanity and eccentricity but it is impossible to draw a line between eccentricity and insanity. Mere eccentricity unaccompanied by any other mental derangement will not prevent a person from disposing of his property by will, *Morgan v. Boys*, 1 Tayl. Med. Jur. 907.

(5) **Old age.**—Mere old age does not deprive a man of the capacity of making a Will. Yet if a man in his old age becomes a very child again in his understanding or by reason of extreme old age or other infirmity he becomes so forgetful that he does not know his own name, he is not fit to make a Will. Extreme old age, however, tends to excite the jealousy and vigilance of the Court, *Kinleside v. Harrison*, 2 Phill. 462. The real test in all cases of this kind is whether the testator had a proper appreciation or comprehension of his act, *Harwood v. Baker*, 3 Moo. P. C. 282; *Prinsep v. Dyce Sombre*, 10 Moo. P. C. 278; *Handley v. Stacey*, 1 F. and F. 574; *Sajid Ali v. Ibad Ali*, 23 Cal. 1; 22 I. A. 171; *Sala Mahomed v. Dame Janbai*, 22 Bom. 17 (P. C.).

(6) **Persons drunk.**—A Will made by a person when he is so excessively drunk that he is utterly deprived of the use of reason and understanding is null and void. It is called *delirium tremens*. But a person who is habitually addicted to drink but is not insane or deranged may make a valid Will. (Explanation 4. Sec. 59.)

(7) **Suicide.**—A will may be made in contemplation of suicide unless the circumstances are such that the testator be deemed in law to be insane. The verdict of the jury that the testator was of unsound mind when he committed suicide is not sufficient if it is otherwise proved that the testator had testamentary capacity when he wrote the will, *Burrows v. Burrows*, 1 Hagg. 109; *Hoby v. Hoby*, 1 Hagg. 146. According to Mahomedan Law if a will is made after taking poison it is bad but not if it is made before, *Mazhar Husen v. Bodha Bibi* 21 All. 91 (P. C.).

Evidence and Onus of Proof.—The law presumes that every man is sane; but this presumption of sanity is a mixed presumption of law and fact. If, therefore, a will is produced before a court and its execution proved and no other evidence offered the court will hold the will proved. Generally speaking in all testamentary cases the onus is imposed on the person propounding the will. But if a party impeaches the validity of the will on account of the supposed incapacity of mind in the testator, it will be incumbent on such party to establish such incapacity. (Williams on Executors, 10th Edn., pp. 14-15), see *Shama Churn v. Khettrmoni*, 27 I. A. 10; *Sukh Dei v. Kedar Nath*, 28 I. A. 186; *Bindeshri v. Mussammatt Baisakh*, 24 C. W. N. 674 P. C.; *Balkrishna v. Gopikabai*, 7 Bom. L. R. 175.

The standard of proof to establish a will required by the Act is that of the prudent man and not an absolute or conclusive one, *Jarat Kumari v. Bissessur*, 39 Cal. 245; *Prasannamayi v. Baikuntha*, 49 Cal. 132. "A will is one of the most solemn documents known to law. By it a dead man entrusts to the living the carrying out of his wishes and as it is impossible that he can be called either to deny his signature or to explain the circumstances in which it was made, it is essential that trustworthy and effectual evidence should be given to establish the will and in case of dispute or doubt the best evidence procurable should be furnished," *Ram Gopal v. Aipna*, 49 I. A. 413 at p. 417. In ordinary cases execution of a will by a competent testator raises the presumption that he knew and approved of the contents of the will, *Woomesh Chunder v. Rashmohini*, 21 Cal. 279. in appeal *Rashmohini v. Umesh Chunder*, 25 Cal. 824.

As regards proof of signature of the testator the best evidence available, viz., the evidence of the attesting witnesses should be given and any evidence of a general nature to the effect that the signature appears to be genuine is of little worth, *Ra-*

the bequest after the testator's death. Also a Mahomedan cannot bequeath anything to an heir and the bequest to an heir will be invalid unless the other heirs consent after the testator's death. A Mahomedan can make an oral will

Cutchi Memons.—In *Adv.-General v. Jimbabi*, 41 Bom. 181 it was held that Cutchi Memons had acquired by custom the power of disposition of the whole of their property by will. See *Sarabai v. Mahomed*, 43 Bom. 641, in which mere instructions given for will were admitted for probate.

61. A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

Will obtained by fraud, coercion or importunity.

Illustrations.

(i) A, falsely and knowingly represents to the testator that the testator's only child is dead, or that he has done some undutiful act and thereby induces the testator to make a will in his, A's favour, such will has been obtained by fraud, and is invalid

(ii) A, by fraud and deception, prevails upon the testator to bequeath a legacy to him. The bequest is void.

(iii) A, being a prisoner by lawful authority, makes his will. The will is not invalid by reason of the imprisonment.

(iv) A, threatens to shoot B, or to burn his house or to cause him to be arrested on a criminal charge, unless he makes a bequest in favour of C. B, in consequence, makes a bequest in favour of C. The bequest is void, the making of it having been caused by coercion.

(v) A, being of sufficient intellect, if undisturbed by the influence of others, to make a will yet being so much under the control of B that he is not a free agent, makes a will, dictated by B. It appears that he would not have executed the will but for fear of B. The will is invalid.

(vi) A, being in so feeble a state of health as to be unable to resist importunity, is pressed by B to make a will of a certain purport and does so merely to purchase peace and in submission to B. The will is invalid.

(vii) A, being in such a state of health as to be capable of exercising his own judgment and volition, B uses urgent intercession and persuasion with him to induce him to make a will of a certain purport. A, in consequence of the intercession and persuasion, but in the free exercise of his judgment and volition, makes his will in the manner recommended by B. The will is not rendered invalid by the intercession and persuasion of B.

(viii) A, with a view to obtaining a legacy from B, pays him attention and flatters him and thereby produces in him a capricious partiality to A. B, in consequence of such attention and flattery, makes his will, by which he leaves a legacy to A. The bequest is not rendered invalid by the attention and flattery of A

(This is sec. 48 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus who were formerly governed by the Hindu Wills Act.)

COMMENTARY.

The word "fraud" has been defined in sec. 17 of the Contract Act; the word "coercion" is defined under sec. 15 of the Contract Act; the phrase "such importunity as takes away the free agency" means "undue influence" and this is defined under sec. 16 of the Contract Act.

Fraud.—"Fraud being infinite the court will not define it." Fraud is either actual or constructive. Actual fraud is subdivided into two parts, (a) misrepresentation and (b) concealment. Illustration (i) is an instance of misrepresentation. Misrepresentation (called *suggestio falsi*) must be of a material fact and must have been relied or acted upon by the person deceived. If the party to whom misrepresentation is made is not misled by it or knows it to be false there is no fraud.

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Constructive Fraud is of various kinds but for the purpose of invalidating a will, if the will is made by a testator at the instance of another who has abused some fiduciary relation it will be declared null and void. Cases of importunity and undue influence come under this group.

A will which is the result of fraud of the one or other kind is null and void, *Allen v. Mcpherson*, 1 H. L. 191; *Boyse v. Rossborough*, 6 H. L. C. 49. The section speaks of a will or any part of a will, therefore if a part of the will is obtained by fraud probate ought to be refused as to that part, and granted as to the rest unless the part rejected alters the whole sense of the remainder of the will, *Rhodes v. Rhodes*, L. R. 7 App. Ca. 192.

Coercion.—Coercion is defined by sec. 15 of the Contract Act as "the committing or threatening to commit any act forbidden by the Indian Penal Code or the unlawful detaining or threatening to detain any property to the prejudice of any person whatever with the intention of causing any person to enter into an agreement." It is the first portion of the definition which would properly apply.

If actual force was used to compel the testator to make the Will and all the formalities are complied with, yet the Will is void, *Mountain v. Bennett*, 1 Cox. 355. So also if the testator is labouring under some fear at the time of bequeathing. But "it is not every fear or a vain fear" that will have the effect of annulling the Will; but a "*just fear*" that the law can take cognisance of, as the fear of death, or of bodily hurt, or of imprisonment.

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Undue influence as defined by sec. 16 of the Contract Act is that relation which subsists between the parties by which one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over that other. Ill. (v) is an instance of undue influence; ill. (vi), (vii), and (viii) are instances of importunity. It is not unlawful for a man by honest intercession and persuasion to procure a Will in favour of himself or another person; it is not necessary that the making of a Will *must originate* with the testator, but when the persuasion is used to such an extent as to amount to force and coercion, destroying free agency, then the Will will be void. Mere influence of affection or attachment is not enough. See *Boye v. Roxborough*, 6 H. L. 6; where the subject of undue influence is fully discussed. Lord Cranworth in delivering the judgment in that case says, "that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a Will, must be an influence exercised either by coercion or by fraud,.....it is not necessary to establish that actual violence has been used or even threatened,..... It is extremely difficult to state in the abstract what acts will constitute undue influence. It is sufficient to say they must range themselves under one or other of these heads—coercion or fraud. To be undue influence in the eye of law there must be—to sum up in one word—coercion;" *e. g.*, a young man may be caught in the coils of a harlot who makes use of her influence to induce him to make a Will in her favour to the exclusion of his relatives. The Will is not void. Again, a man may be the companion of another who leads him to evil courses and thus obtains what is commonly called an undue influence over him and the consequence may be a Will in his favour. This again will not amount to undue influence in law, so as to vitiate the Will, *Wingrove v. Wingrove*, L. R. 11 P. D. 81.

Undue influence is coercion only if it takes away the free agency of the testator. Whatever destroys the free agency of the testator constitutes coercion, *i. e.*, that the volition of the testator was repressed, that the pressure was such as the testator could not resist, *Jajneswari v. Ugreshwari*, 11 C. W. N. 824. The mere fact that in making his will he was influenced by immoral (*Hall v. Hall*, L. R. 1 P. & M. 481, *Bandairs v. Richardson*, 1906 A. C. 169) or irreligious (*Morley v.*

becomes the subject of consideration in cases of persons of old age or of weak intellect or in cases of persons related to each other, *e. g.*, between a trustee and a *cestui que trust* or any other fiduciary relation or between a father and son and a husband and wife. In case of wills of persons of old age it is not mere old age that would give rise to suspicion, but extreme old age tends to excite the jealousy of the Court, *Sajid Ali v. Ibad Ali*, 22 I. A. 171. In case of wills of persons of weak intellect their Lordships of the Privy Council in the case of *Sala Mahomed v. Dame Janbai*, 22 Bom. 17 observed that if the testator is in such a state of illness that he

of mental powers the stands in a fiduciary f that other and by so using his position he obtains a benefit for himself the will is void. "Persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them unless they can show to the

satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them," *Vaughton v. Noble*, 30 Beav. 34 at 39. If a solicitor prepares a will for a testator under which certain benefits are conferred on him it will lie on him to discharge the onus, *Gangabai v. Bhagwandas Waljee*, 32 I. A. 142; see also *Bur Singh v. Uttam Singh*, 38 Cal. 355.

As regards husband and wife, see *Boyse v. Rosborough*, 6 H. L. 47. It is not improper for a wife to gain by her conduct the affection of her husband and thereby obtain benefit for herself. It is only if a wife by falsehood raises prejudices in the mind of her husband and by contrivance keeps him aloof from his relatives and by such contrivances induces the husband to will away his properties to her, such a conduct would excite the jealousy of the Court, *Sila Mahomed v. Dame Janbai*, 22 Bom. 17 (P. C.); *Morison v. Adm.-General*, 7 Mad. 515. Conversely if a husband uses his position to dominate the will of his wife the transaction would be declared null and void, *Turnbull & Co. v. Duval*, 6 C. W. N. 809. When dealing with the case of a will of a Parida Lady a particular and peculiar onus rests upon those who propound the will. They must show that the executant thoroughly understood what she was doing and was fully acquainted with the terms of the document she was executing, *Khas Mehal v. Adm.-General of Bengal*, 5 C. W. N. 505; *Sarat-kumari v. Amullyadhan*, 25 Bom. L. R. 548 at 556 P. C.

As to the exercise of undue influence by religious or spiritual ascendancy, see *Huguenin v. Baseley*, 14 Ves. 273; *Hall v. Hall*, L. R. 1 P. & D. 481.

Evidence of Coercion and Undue Influence and herein the Rule in Barry v. Butlin, 2 Moo. P. C. 480.—To be undue influence in the eye of law there must be evidence of coercion using this word in the popular sense. Hence, in the absence of such evidence, general evidence to show that the testator was infirm in health and blind and that the respondent was a woman of superior intellect and had acquired dominion over the testator's mind is of little avail, *Sala Mahomed v. Dame Janbai*, 24 I. A. 148. Further, the evidence as to undue influence should be in relation to the will itself and not in relation to other matters or transactions, *Bayse v. Rosborough*, *supra*.

Rule in Barry v. Butlin.—Where a Will is prepared by a person or where its execution is conducted by a person who is himself benefited by its dispositions, that is a circumstance which ought generally to excite the suspicion of the Court, and calls on it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper does express the true Will of the deceased. *Barry v. Butlin* lays down two rules:—

(1) That the *onus probandi* lies upon the party propounding a Will, who must satisfy the conscience of the Court that the instrument propounded is the last Will of a free and capable testator, *Musst. Padma v. Dharma Day*, 15 C. W. N. 728; *Surendra v. Rani Dassi*, 47 Cal. 1043.

(2) That if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the

is given by a person to another not to revoke a will, the covenant will be a binding covenant for breach of which an action will lie for damages, though the covenant cannot be specifically enforced, that is to say, the covenant will not prevent the person from revoking the will, *Robinson v. Omminey*, 23 C. D. 285; *Re Parkin, Hill v. Schwarz* (1892) 3 Ch. 510; *Maddison v. Alderson*, 8 A. C. 467; *Loffus v. Maw*, 3 Giff. 592. No suit will lie for cancellation of the will in the life-time of the testator, *Rambhajan v. Gurcharan*, 27 All. 14.

The only instance in which a will cannot be revoked is in the case of mutual Wills which become irrevocable after the death of one of the makers, if the survivor takes advantage of the provisions made by the other, *Dufour v. Pereira*, 1 Dick. 419.

As to the modes prescribed for revocation, see sec. 70.

CHAPTER III.

Of the Execution of Unprivileged Wills.

63. Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or a mariner at sea, shall execute his will according to the following rules:—

Execution of unprivileged wills

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

This is sec. 30 of the Succession Act N of 1865 with slight alterations in clause (c) where the words "has" and "shall" are substituted for the words "must." It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act.

COMMENTARY.

This section deals with the execution of unprivileged wills. Under this Act a will must be in writing; an oral or nuncupative will is not recognised. There are

Form of Attestation.—Though no particular form of attestation is necessary (*In the goods of Roymoney Dossee*, 1 Cal. 150) it is advisable to add one at the end of every will. The following is the usual form :—

Signed by the said A. B. the testator abovenamed as and for his last will and testament in the presence of us present at the same time who at his request in his presence (and in the presence of each other) have hereunto subscribed our names as witnesses. } A. B.

C. D.

E. F.

Though the words in parenthesis are not required by the section, they may usefully be inserted. The attestation must be *animo testandi*. What is essential is that each witness must sign the will in the presence of the testator, *Doc v. Manifold*, 1 M. & S. 249; *Newton v. Clarke*, 2 Curt. 320; *Tribe v. Tribe*, 7 Notes of Cas. 132, though the testator need not sign in their presence. It is also not necessary that both or all the witnesses should be present at the same time as under the English Wills Act. The attestation must be after the testator has signed the will and not before, *Bissonath v. Doyaram*, 5 Cal. 738. The attestation must be by the signature of the witnesses and not by their mark, *Fernandez v. Alves*, 3 Bom. 382; *In the matter of Hurro Sundari Dabia*, 6 Cal. 17; *Nitye Gopal v. Nagendra Nath*, 11 Cal. 429; *Horendranarain v. Chandrakanta*, 16 Cal. 19. The initials of attesting witnesses however are sufficient, *Ahmayec v. Yalumalai*, 15 Mad 261.

Rules 1 and 2 are to be observed where the will is to be signed. Rule 3 comes into operation when the will is already signed and the witnesses are required to attest it. This is called acknowledgment.

What is sufficient Acknowledgment.—When the testator does not execute the will in the presence of the attesting witnesses but the attesting witnesses put their signatures on the *peronaal* acknowledgment of the execution of the will by the testator, the question arises what would in law constitute a sufficient acknowledgment and the result of the cases decided appears to be as follows:—It is not necessary that the testator should in express terms say, "That is my signature." It would be sufficient, if the testator produces a paper and makes his witnesses understand that it is his will, even though the witnesses do not see him sign it or observe his signature, provided the Court is satisfied that the testator's signature was there, when the witnesses attested it, *Hlott v. Genge*, 3 Curt. 172; *Manickbai v. Hormasji*, 1 Bom. 547, 376 (cheap Edition); *Amarendra Nath v. Kashi Nath*, 27 Cal. 169. "Where the testator produces the will with his signature *visibly apparent* on the face of it to the witnesses and requests them to subscribe it, this is a sufficient acknowledgment of his signature. But not where they are unable to see the signature and the testator merely calls them to sign, without giving them any explanation of the instrument they are signing." (Williams on Executors, 10th Edn. pp. 64-65.) The whole law as to what is a sufficient acknowledgment is fully discussed in *Blake v. Blake*, 7 P. D. 102, where it is laid down, that where the evidence is such that the Court concludes that the witnesses did not see the signature, the fact that the testator spoke to the witnesses that it was his will is not a sufficient acknowledgment, if the witnesses were not able to see his signature. The witnesses must at the time of acknowledgment see or have the opportunity of seeing the signature

of the testator, and if such be not the case it is immaterial whether the signature be, in fact, there at the time of attestation or whether the testator say that the paper to be attested is his will. If the signature of the testator is covered up so that the attesting witnesses do not see it, there would be no sufficient acknowledgment. *Hott v. Genge*, 4 Moo. P. C. 265. But if the attesting witnesses had an opportunity of seeing it, that would be sufficient, though in fact they did not see it (*Thobald on Wills*). The Bombay High Court in the case of *Balmukund v. Bageswari*, 15 Bom. L. R. 209, has laid down that it is a sufficient acknowledgment by a testator of his signature to his will if he makes the attesting witnesses understand that the paper which they attest is his will, though they do not see him sign it. *Mawickbai v. Horrasji*, *supra*; see also *Sibo Sundari v. Hemangini*, 4 C. W. N. 204. The testator alone can make an acknowledgment and not the attesting witness, *Moore v. King*, 3 Curt. 243.

Sec. 63 requires the personal acknowledgment by the testator; a request by a third party to the witnesses to subscribe to the will would not be a sufficient acknowledgment.

The acknowledgment must be made by the testator before the witnesses subscribe to the will. An acknowledgment after the attestation is insufficient. *In the goods of Olding*, 2 Curt. 865; *Cooper v. Bockett*, 4 Moo. P. C. 419.

Acknowledgment before Registrar.—When a testator admits execution before the Registrar and is properly identified and the Registrar and the identifying person attest the will in the presence of the testator, it is sufficient, *Nitye Gopal v. Nagendra*, 11 Cal. 429; *Harendranarain v. Chandrakanta*, 16 Cal. 19; *Amarendra v. Kashi Nath*, 27 Cal. 169; *Sarada Prasad v. Triguna*, 1 Pat. 300. See the observations of their Lordships of the Privy Council in *Gangamayi v. Troiluckhya*, 33 Cal. 537 (P. C.).

Evidence of Due Execution.—The best evidence is that of attesting witnesses. A will can be proved by one of the attesting witnesses, *Rammol v. Halol*, 22 C. W. N. 315. But attestation does not estop a person from denying anything except that he has witnessed execution; knowledge of contents ought not to be inferred from the mere fact of attestation, *Pandurang v. Marhandeys*, 24 Bom. L. R. 557 (P. C.). It is also not absolutely necessary to adduce positive affirmative evidence of due execution to prove the will, *Blake v. Knight*, (1842) 3 Curt. 547 at 561. In *Bankin Bihari v. Srimati Matangini*, 24 C. W. N. 626, their Lordships of the Privy Council did not consider the non-examination of all the attesting witnesses as destructive of the proof of due execution and they remarked that "there is on some occasions a tendency amongst litigants in India as elsewhere to back up a good case by false or exaggerated evidence." The court may take into consideration all the circumstances of the case and when a will is regularly executed, on the face of it, an inference will arise that all the requisites were complied with. The maxim "*omnia presumuntur rite esse acta*" in such cases comes into operation where there is one way or the other. This presumption arises in the following cases:—

both the attesting witnesses are dead.

the recollection of both the attesting witnesses is vague

Thirdly.—Where witnesses contradict one another or both of them state or one of them states facts showing that the will was not duly executed, (Mortimer on Probate p. 153). The mere fact that attesting witnesses have repudiated their signature does not invalidate the will, if it can be proved by reliable evidence, *Brhamadat v. Chudan Bibi*, 20 C. W. N. 192. If the evidence is strong and satisfactory as to due execution, to outweigh it, it would be necessary to prove the improbability to be cogent and clearly made out, *Chotey Narain v. Ratan Koer*, 22 Cal. 519 (P. C.). It is not necessary that each attesting witness should prove the same fact. One witness may depose to the signature and another may depose to acknowledgment, *Muktanath v. Jitendra*, 19 C. W. N. 1295. If the evidence is conflicting it is the duty of the appeal court to have great regard to the opinion of the trial Judge, *Woomesh Chunder v. Rashmohini*, 21 Cal. 279; *Romesh Chunder v. Rajani Kant*, 21 Cal. 1 (P. C.); *Shunmugaraya v. Manikka*, 32 Mad. 400, (P. C.).

Hindus.—Wills of Hindus within the territories mentioned in sec. 57, *i.e.*, Hindus who were formerly governed by the Hindu Wills Act must be executed with all the formalities mentioned in the above rules, that is to say, all wills made by Hindus after 1st September 1870 within the territory subject to the Lieutenant-Governor of Bengal or the local limits of the ordinary original civil jurisdiction of the High Court of Bombay and Madras and all wills made outside those territories and limits but relating to immoveable property within those territories and limits must be executed in accordance with the above rules and formalities. Wills made by Hindus outside those limits, *i.e.*, in the mofussil and not relating to any immoveable property within the territory subject to the Lieutenant-Governor of Bengal or in the towns of Bombay and Madras may be in any form; they may be oral or nuncupative, they may be in writing without any signature or attestation or may be signed by the testator, without being attested. *Mancharji v. Narayan*, 1 B. H. C. 77; *Vinayak v. Gorindrav*, 6 B. H. C. 224 *a. c. j.*; No formalities are required for the execution of Hindu wills which are not governed by the Hindu Wills Act, See *Bhagvan v. Kala*, 1 Bom. 641; *Radhabai v. Ganesh*, 3 Bom. 7; *Gokuldas v. Purshotamdas*, 1 Bom. L. R. 470; *Bapuji v. Jagannath*, 20 Bom. 674.

Mahomedans.—As the Mahomedans are excluded under sec. 58, a will made by a Mahomedan may be in any form. It may be oral or written. By Mahomedan Law no writing is required to make a will valid and no particular form is necessary so long as the intention of the testator is sufficiently ascertained. If it is in writing but not signed it will be valid. It is sufficient if the will is really and truly proved to be the will of the testator, *Aulia Bibi v. Ala-ud-din*, 28 All. 715.

Cutchi Memons.—A will of a Cutchi Memon does not require attestation, *In re Aba Satar*, 7 Bom. L. R. 558. A Cutchi Memon is not a Hindu within the meaning of the Hindu Wills Act, *In re Haji Ismail*, 6 Bom. 452; *Adv.-General v. Jimbabai*, 41 Bom. 181.

Persons who have not a British Indian Domicile.—Wills made by persons who are not domiciled in British India so far as the same relate to immoveable property situate within British India must be executed in accordance with the rules given above. A will made by a person who is not domiciled in British India so far as the same relate to the moveable property of such person whether in British India or elsewhere must be executed in accordance with the law of his domicile at the

64. If a testator, in a will or codicil duly attested, refers to any other document then actually written as expressing any part of his intentions, such document shall be deemed to form a part of the will or codicil in which it is referred to.

Incorporation of papers by reference

(This is sec. 31 of the Succession Act X of 1925. It applies to Hindus within the territories mentioned in Sec. 27 & c. to Hindus formerly governed by the Hindu Wills Act.)

COMMENTARY.

Of the Incorporation of papers referred to in a Will or Codicil.

When a testator refers in his will or codicil to any document, or mentions a previous will which is not legally executed, the question arises whether such document or will should be incorporated as forming a part of the will or codicil in which it is referred to. By sec. 64 it is enacted that if the testator in his will or codicil refers to any document then actually written as expressing any part of his intentions, such document shall be incorporated. *Mossabhai v. Facoobhai*, 29 Bom. 267. Before a document can be incorporated the following conditions must be complied with:—

- (1) The document must be of a testamentary nature, *Hasbergham v. Vincent*, 2 Ves. 228.
- (2) The document must be in existence at the date of the will or codicil in which it is referred to and described as existing. A paper not in existence at the date of the execution of the testamentary instrument cannot be incorporated in it or referred to for purposes of construction, *Singleton v. Tomlinson*, 3 App. C. 404.
- (3) The document must be clearly identified with the description of it given in the will, *University College of North Wales v. Taylor*, (1908) P. 140; *Allen v. Maddock*, 11 Moo. P. C. 427.
- (4) The intention to incorporate must be clear, *Hasbergham v. Vincent*, *supra*.

Where there is a reference in a duly executed testamentary instrument to another testamentary instrument, by such terms as to make it capable of identification, it is necessarily a subject of parol evidence, and if the document is

described as *then existing* in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, *Allen v. Maddock*, 11 Moore, P. C. 427 at 454.

Whether incorporated documents should be included in probate.—The question whether documents not in themselves of a testamentary character but incorporated with the will should be included in the probate is mainly one of convenience. If the document is valid in itself independently of the will, it would seem that, it need not be included in the probate, if there is a difficulty in procuring its production. If the document derives its validity from the will it ought, as a general rule, to be included, *Sheldon v. Sheldon*, 1 Rob. 81. (Theobald on Wills 7th Edn. p. 80.) The Court will not insist on including the incorporated paper in probate if the document is bulky or if it is in the hands of a third party and the Court has no power to order its production.

Effect of incorporation.—Incorporation of an instrument into a will does not alter the effect of the instrument so far as it is already valid. So far as it is invalid as an independent instrument it takes effect as a testamentary disposition subject to the ordinary rules as to lapse, ademption, etc., applicable to wills, *Bizzey v. Flight*, (1876) 3 C. D. 269.

Examples.

(1) A makes a will which is invalid. Afterwards A executes a document beginning with the words, "This is a codicil to my last will and testament." It is proved that A had left no other will. *Held* that the will was incorporated in the codicil, *Allen v. Maddock*, 11 Moore's P. C. 427.

(2) A executes a codicil with the words, "This is a third codicil to my will." The codicil is invalid. Afterwards A executes another codicil beginning with the words, "This is the fourth codicil to my will." Is the third codicil incorporated in the fourth codicil? No. There is no sufficient identification of the document, *Stockil v. Punshon*, L. R. 6 P. D. 9.

NOTE.—Generally a duly attested codicil to a will will incorporate the will if there is only one document in existence to which the term "will" can apply. A codicil to a prior unattested codicil will incorporate the unattested codicil, *Smith's case*, 2 Curt. 796. But a reference in a codicil to a will and prior codicils where there is a will and codicils duly attested, and also other codicils not duly attested, will only incorporate the will and the duly attested codicils, *Croker v. Marquis of Hertford*, 4 Moo. P. C. 339, and similarly a reference by a codicil to a will only where there is a duly attested will and some unattested codicils will not set up the unattested codicils, *Utterton v. Robins*, 1 A. & E. 423. (Theobald on Wills 7th Edn. p. 68.)

(3) A by her will bequeathed her trinkets to be divided "as I shall direct in a small memorandum." On A's death the will and two codicils and a paper headed "Memorandum of trinkets referred to in my will" were found folded together. It is not proved that the memorandum was in existence at the date of the will but it is proved that it was written before the date of the last codicil which did not refer to it. *Held*: that the memorandum cannot be incorporated, *In the goods of Matthias*, 3 Sw. and Tr. 100.

(4) A will made reference to a deed-poll which was executed at the same time, *Held* that the deed-poll was not a testamentary document requiring probate, the reference to it in the will not being for the purpose of making its contents part of the will, *Gangabai v. Bhugwandas*, 29 Bom. 530 (P. C.) 32 I. A. 142.

(5) A testator made a codicil to his will in 1845 which was attested by one witness and the day before his death he dictated a paper as "another codicil to my will" which was

Mode of making,
and rules for execu-
ting, privileged wills.

66. (1) Privileged wills may be in writing,
or may be made by word of mouth.

(2) The execution of privileged wills shall be governed by the following rules :—

(a) The will may be written wholly by the testator, with his own hand. In such case it need not be signed or attested.

(b) It may be written wholly or in part by another person, and signed by the testator. In such case it need not be attested.

(c) If the instrument purporting to be a will is written wholly or in part by another person, and not signed by the testator, it shall be deemed to be his will, if it is shown that it was written by the testator's directions or that he recognised it as his will.

(d) If it appears on the face of the instrument that the execution of it in the manner intended by the testator was not completed, the instrument shall not, by reason of that circumstance, be invalid, provided that his non-execution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intentions expressed in the instrument.

(e) If the soldier or mariner has written instructions for the preparation of his will, but has died before it could be prepared and executed, such instructions shall be considered to constitute his will.

(f) If the soldier or mariner has, in the presence of two witnesses, given verbal instructions for the preparation of his will, and they have been reduced into writing in his lifetime, but he has died before the instrument could be prepared and executed, such instructions shall be considered to constitute his will, although they may not have been reduced into writing in his presence, nor read over to him.

(g) The soldier or mariner may make a will by word of mouth by declaring his intentions before two witnesses present at the same time.

(h) A will made by word of mouth shall be null at the expiration of one month after the testator, being still alive, has ceased to be entitled to make privileged will.

(This is sec. 53 of the Succession Act X of 1865. In clause (h) the words "being still alive" are added).

COMMENTARY.

Of the execution of Privileged Wills.—

A privileged will is a will made by a soldier on an expedition or engaged in actual warfare or by a mariner when at sea. A soldier whilst in barracks or a sailor on shore cannot execute a privileged will, *Drummond v. Parish*, 3 Curt. 522; *Re Hill*, 1 Rob. 276. In such cases he must execute his will according to the rules prescribed for executing unprivileged wills.

The soldier or mariner must have attained his majority, *i. e.*, he must have completed the age of 18 years.

"Mariner" means a seaman and includes the whole service from cook to captain, *In Re Hayes*, 2 Curt. 338; also a surgeon in the navy, *In Re Saunders*, L. R. 1 P. & D. 16; and also merchant seamen, *Morrell v. Morrell*, 1 Hagg. 51. In order to be privileged the mariner must be "at sea", which means the time he goes on board, *The Earl of Euston v. Seymour*, 2 Curt. 339, 3 Curt. 530; *In the goods of Lay*, 2 Curt. 375; *In the goods of Mc. Murdo*, L. R. 1 P. & D. 540.

A privileged will may be either *verbal* or *written*.

If it is verbal, it must be declared before *two witnesses* present at the same time.

A verbal will shall be null and void at the expiration of one month after the soldier or mariner shall have ceased to be entitled to make a privileged will.

If the Will is in writing, the following rules apply:—

	<i>Written by whom.</i>	<i>Signature of testator.</i>	<i>Attestation.</i>
Rule (1)	By the testator wholly.	Not necessary.	Not necessary.
Rule (2)	By another person, wholly or in part.	Necessary.	Not necessary.

NOTE.—If it is not signed by the testator it will be necessary to show that it was written by the testator's direction or that he recognised it as his will.

Rule 3.—If the soldier or mariner leaves *written instructions* for his will but dies before the will is prepared and executed, such instructions shall constitute his will.

Rule 4.—If the soldier or mariner gives *verbal instructions* to prepare his will in the presence of *two witnesses* and the instructions are *reduced to writing* in his lifetime but he dies before the will is prepared and executed, such instructions shall constitute his will, although the instructions may not have been reduced into writing in his presence nor read over to him. An entry regarding the disposal of a soldier's estate in a kindred roll kept by military authorities is not a will, *Bhagubai v. Appaji*, 47 Bom. 552.

CHAPTER V.

Of the Attestation, Revocation, Alteration and Revival of Wills.

67. A will shall not be deemed to be insufficiently attested by reason of any benefit thereby given either by way of bequest or by way of appointment to any person attesting it, or to his or her wife or husband; but the bequest or appointment shall be void so far as concerns the person so attesting, or the wife or husband of such person, or any person claiming under either of them.

Explanation.—A legatee under a will does not lose his legacy by attesting a codicil which confirms the will.

(This is sec. 54 of the Succession Act X of 1865.)

68. No person, by reason of interest in, or of his being an executor of, a will, shall be disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.

(This is sec. 55 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act.)

COMMENTARY.

Of Attesting Witnesses.—Any person is competent to attest a will. It is not necessary that he should know the contents of the will which he is attesting. He merely witnesses the signature of the testator. The executor named in the will is competent to attest and also a legatee or a beneficiary. But any legacy or bequest given to a person who attests the will, or to his wife or husband, or to any person claiming under either of them shall be null and void. A gift, however, to an attesting witness as trustee is not void, *Cresswell v. Cresswell*, 6 Eq. 69.

Sec. 67 does not apply to Hindus. Hence the attesting witness to the will of a Hindu does not lose the legacy given to him by the will.

Examples.

(1) A by his will gives a legacy of Rs. 1,000 to B who is one of the attesting witnesses. The will is valid but B is not entitled to receive Rs. 1,000.

(2) A executes a will which is attested by B and C. A legacy of Rs. 1,000 is bequeathed to D who is B's wife and another of Rs. 1,000 to E who is C's son. The will is valid. The legacy to E is also valid but the legacy to D is void.

(3) A executes a will which is attested by B and C. A legacy of Rs. 1,000 is bequeathed to B. A dies. Then B dies without receiving the legacy leaving E as his heir. E cannot get the legacy as he claims under B.

(4) A left a will giving a legacy to B who is an attesting witness. A afterwards executes a codicil confirming the legacy to B to which codicil B was not an attesting witness. B is entitled to the legacy by virtue of the codicil, *Anderson v. Anderson*, 13 Eq. 381.

(5) A left a will giving a legacy to B. The will is attested by C and D. Subsequently A executes a codicil confirming the will which is attested by B and C. B does not lose his legacy by attesting the codicil. (Explanation to Sec. 67.)

(6) A executes a will which is attested by B, C, and D. A legacy of Rs. 1,000 is given to D. D cannot take the legacy, though without him there was the full number of witnesses, *Administrator-General v. Lazar*, 4 Mad. 244.

(7) A by his will gives Rs. 10,000 to B for life and after B's death to B's children equally. B attests the will. The gift to B for life is bad. But B's children will take an immediate interest in Rs. 10,000 and the same will be divided amongst them equally, *In Re Townsend's Estate*, L. R. 34 Ch. D. 357.

(8) A by his will gives Rs. 1,000 to B. The will is attested by C and D. B afterwards marries C. Is the legacy of Rs. 1,000 to B void? No. Marriage after attestation does not affect the bequest or legacy, *Thorpe v. Bestwick*, L. R. 6 Q. B. D. 311.

(9) A by his will appoints B as his executor and bequeaths to him Rs. 1,000. B is one of the attesting witnesses. B is entitled to prove the will but he loses the legacy of Rs. 1,000.

(10) A will is attested by a solicitor. The will allows the solicitor to make professional charges for the work which he may do in respect of the estate of the testator. The solicitor loses his professional charges, *Re Pooley*, 40 Ch. D. 1.

(11) A, a Hindu, executes a will containing a clause for the benefit of the solicitor who prepared and attested the will. Does the solicitor lose the benefit? No. Sec. 67 of the Act does not apply to Hindus. Accordingly, an attesting witness of the will of a Hindu governed by the Hindu Wills Act does not lose any legacy thereby bequeathed to him, *Bai Gangabai v. Bhugwandas*, 29 Bom. 530.

(12) A bequeaths his property to his wife for life and after her to his three children X, Y, & Z or the survivor equally and there was a residuary clause in favour of the wife. X attested the will. After the widow's death Y filed a suit that X was incapable of taking and that the property be divided between Y & Z. *Held* share of X lapsed but it fell into the residue and did not accrue to Y & Z, *Camani v. Barefoot*, 26 Mad. 433.

69. Every will shall be revoked by the marriage of the maker, except a will made in exercise of a power of appointment, when the property over which the power of appointment is exercised would not, in default of such appointment, pass to his or her executor or administrator, or to the person entitled in case of intestacy.

Revocation of will
by testator's marriage.

Explanation.—Where a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property.

(This is sec. 66 of the Succession Act X of 1865.)

70. No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same.

Revocation of un-
privileged will or
codicil.

Illustrations.

(i) A has made an unprivileged will. Afterwards A makes another unprivileged will which purports to revoke the first. This is a revocation.

(ii) A has made an unprivileged will. Afterwards, A, being entitled to make a privileged will, makes a privileged will, which purports to revoke his unprivileged will. This is a revocation.

(This is sec. 57 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus who were formerly governed by the Hindu Wills Act, except that marriage shall not have effect of revoking a will. See Schedule III, cl. (4).)

COMMENTARY.

By sec. 62 it is provided that the testator can revoke the will at any time. These sections prescribe the modes of revocation of unprivileged wills and the modes prescribed in sec. 70 are exhaustive. The words "otherwise destroying" are *ejusdem generis* of burning, tearing, etc. The modes provided are (a) revocation by marriage; (b) revocation by another will or codicil; (c) revocation by some other writing and (d) revocation by burning, tearing or destroying. This Act has not adopted the principle that a will should be deemed to be revoked in consequence of the change in circumstances of the testator or by his change of domicile or a change

with respect to his rights to the property he disposes of, *Bodi v. Venkataswami*, 38 Mad 369; *Subba Reddi v. Doraisami*, 30 Mad. 369.

(A) By the Marriage of the maker.—Every will whether unprivileged or privileged is revoked by marriage of the maker. It is not only the first marriage but any subsequent marriage. A will made subsequently to the first marriage but previously to the second marriage in the lifetime of the first wife was held to be revoked in *Gabriel v. Mordakai*, 1 Cal. 148.

Exceptions.—(a) A will made in exercise of a power of appointment is not revoked by the marriage of the maker when the property over which the power of appointment is exercised would not in default of such appointment pass to his or her executor or administrator or to the person entitled in case of intestacy, *e. g.*—

(1) A has power to appoint certain property by will to any person he likes. A by a will appoints the property to B. A then marries. The will is void, because if A had died without executing the power (*i. e.*, in default of appointment) the property would have gone to A's executors or administrators or to the person entitled in case of intestacy.

(2) (a) Again, A has power to appoint certain property by will to such of the children of B as A likes, and in default of appointment the property is to go to all the children of B in equal shares. A makes a will and exercises the power in favour of one of the children of B. A then marries. The will is not revoked because if A had not exercised the power the property would have gone to all the children of B.

(b) Where two persons make mutual wills the marriage of one of them does not revoke the will of the other, *Hinckley v. Simmons*, 4 Ves. 160.

(c) As sec. 69 does not apply to Hindus, a will made by a Hindu, whether governed by the Hindu Wills Act or otherwise, is not revoked by his marriage, *Subba Reddi v. Doraisami*, 30 Mad. 369.

(d) The will of a Mahomedan is not revoked by his marriage. But as sec. 69 applies to Parsis, the will of a Parsi is revoked by his marriage.

(e) There is no revocation where the marriage is void, *e. g.*, with a deceased wife's sister, *Mette v. Mette*, 1 Sw. and Tr. 416. In *Warter v. Warter*, (1890), L. R. 15 P. D. 152, one Taylor obtained in the Calcutta High Court a decree absolute for dissolution of his marriage on 27th November 1879. The divorced wife was married to Colonel Warter on 3rd February 1880, *i. e.*, within six months from the date of decree. Three days later Colonel Warter made a will in favour of his wife. The marriage of 3rd February 1880 having been performed within six months from the date of decree was void under the Indian Divorce Act. In April 1881 on the advice of a solicitor Colonel and Mrs. Warter were remarried at a registry office. Colonel Warter having died without re-executing his will or making another, the question arose whether the marriage of April 1881 revoked the will. It was held that the marriage of February 1880 was null and void and therefore the marriage of April 1881 was valid and revoked the will (cited in *Jackson v. Jackson*, 34 All. 203.).

(B) By another Will or Codicil.—This follows from the ambulatory nature of the will, that the *last* testament shall be operative to the exclusion of previous

contrary or inconsistent ones. But the intention to revoke a former will must be clear, *e.g.*, when the later instrument contains words of express revocation; a general revocatory clause revoking all former wills and codicils is usual in all well drafted wills. Where the later instrument contains no words of express revocation but the dispositions made in the later instrument are of such a character as cannot stand with the first it can be inferred that the testator intended to revoke the first, *Sahib Mirza v. Urida Khanam*, 19 Cal. 444, 19 I. A. 83. The mere fact of making a subsequent will does not necessarily revoke the former ones unless the subsequent will expressly or in effect revokes all former wills or the two are inconsistent and incapable of standing together. A man may die leaving two or several wills and both or all of them will be entitled to probate if they are not inconsistent with each other, *In the goods of Budd* 3 Sw. and Tr. 196. The mere use of the words "This is my last will" does not necessarily import a revocation of all previous wills, *Cutto v. Gilbert*, 100 P. C. 131. In all cases evidence as to intention to revoke must be clear. A codicil revoking a will does not necessarily revoke a prior codicil, *Farrer v. St. Catherine's Coll.*, 16 Eq. 19. Formerly a revocation of the will was an implied revocation of the codicil but now a codicil to a will is not revoked by the revocation of the will, *In the goods of Savage*, L. R. 2 P. & D. 78; *In the goods of Turner*, L. R. 2 P. & D. 403.

Where there are two inconsistent wills, both of same date or undated, both are void for uncertainty, *Townsend v. Moore*, (1905) P. 66. But in such cases it is the duty of the Court to try to reconcile them if possible, *Raikishori v. Debendranath*, 15 Cal. 409 (P. C.).

A subsequent will or codicil made under the impulse of a mistaken notion of facts will not revoke a former one. But in such cases it must be proved that the impulse was the foundation of his wish to change his former intent, *e.g.*, a bequest is made to A and afterwards by another will, without destroying the first, the same bequest is made to B stating her to be his wife, but B had a husband living of which fact the testator was deceived. In such a case the second will will not operate as a revocation of the former will. See also *Crosthwaite v. Dean*, 5 Eq. 245. A testator gave legacies to the grandchildren of his sister, and afterwards by a codicil revoked the legacies, giving as a reason, that the legatees were dead. It was proved that the legatees were not dead. *Held* that the legacies were not revoked as the cause of revocation was false, *Campbell v. French*, 3 Ves. 322; *Doe v. Erans*, 10 A. & E. 288.

A will is not to be treated as revoked either wholly or in part by a will which is not forthcoming unless it is proved by satisfactory evidence that the will contained a revocatory clause or that its dispositions cannot stand with the existing will, *Sahib Mirza v. Urida Khanam*, *supra*.

(C) By some Writing declaring an intention to revoke and executed in the manner in which an unprivileged will is required to be executed, *i.e.*, the writing must be signed by the testator and attested by two witnesses. This is cancellation of will. Ordinarily a will is cancelled by drawing lines across it and also by cancelling the signature and of the attesting witnesses. But that is not enough if the will is not torn. The cancellation must be signed by the testator and attested by two witnesses, *Cheese v. Lovejoy*, L. R. 2 P. D. 251.

(D) By Burning, Tearing or otherwise Destroying the will by the testator or by some person *in his presence and by his direction* with the *intention* of revoking the same. Thus, if the testator obliterates his own signature or that of the attesting witnesses with the intention of revoking the will or cuts off his signature, that would amount to a complete revocation, *In the goods of Lewis*, 1 Sw. & Tr. 31. The act of burning, tearing, or destroying the will must take place in the presence of the testator and must be by his directions, *In the goods of Dadds*, Dea. & Sw. 290. There must in all cases be the *animus revocandi*, and the act. Both must concur in order to constitute a legal revocation. If the act of destruction is inchoate and incomplete it will not amount to a revocation. Evidence is not admissible to prove that the testator had said that he had torn up the will, *Shib Sahitri v. Collector of Meerut*, 29 All. 82; *Keen v. Keen*, 3 P. & D. 105; *In the estate of Mackenzie*, (1909) P. 305. Actual destruction or formal revocation in writing is not essential to constitute revocation of a Hindu will under the Hindu Wills Act, *Chelikani v. Chelikani*, 7 C. W. N. 1 (P. C.) 29 I. A. 156.

The revocatory acts if done by a third person by the testator's directions, must also be done in his presence. A will burnt by the testator's order but not in his presence is not revoked.

Obliterating or tearing off the names of the attesting witnesses is sufficient to revoke the will, *In the goods of James*, 1 Sw. & Tr. 138. But striking through the will or the signature of the testator with a pen is not sufficient to revoke his will, *Stephens v. Tapprell*, 2 Curt. 458.

The words "otherwise destroying" denote modes of destruction *ejusdem generis*. Where a will is written on several sheets of paper and each sheet signed and attested tearing off the last signature will revoke the whole will, *In Re Gullan*, 1 Sw. & Tr. 31; see also *Kedar Nath v. Sarojint*, 3 C. W. N. 617.

A will may be revoked in part, *e. g.*, where a clause is cut off, *Clarke v. Scripps*, 2 Rob. 563.

Examples.

(1) A whilst delirious tears up his will into pieces. The pieces are preserved. On recovering A is informed of what he had done, and he said he would make a fresh will. A dies without making a fresh will. The will is not revoked. A had no *animus revocandi* when he tore up the will, *Brunt v. Brunt*, L. R. 3 P. & D. 37.

(2) A being moved with a sudden impulse of passion against a devisee under his will conceived the intention of cancelling it. Having torn the will twice through his arms were arrested and his anger mitigated by the submission of the devisee. He then fitted the pieces together and said, "It is a good job, it is no worse." *Held*: there was no revocation of the will, *Doe v. Perkes*, 3 B. & A. 489.

(3) A says in the presence of B and C, "I revoke my will." The will is not revoked. A will cannot be revoked orally. (A Hindu will which is not governed by the Hindu Wills Act can be revoked by parol. *Maharajah Pertab Narain Singh v. Maharanee Subhao Koer*, 4 I. A. 228.).

(4) A residing at Poona writes to B, his solicitor in Bombay, to destroy his will. B destroys it. The will is not revoked and probate will be granted of the draft copy. The destruction must be in the presence of the testator, *In the goods of Dadds*, Des. and Sw. 290.

(5) A cuts off his signature and the signature of the attesting witnesses to his will and gums the signatures again on the same place. The will is revoked, the gumming in will not revive the will, *Bell v. Fothergill*, L. R. 1 P. & D. 148.

(6) A erases out his signature and writes it again in a better way, but not in the presence of the attesting witnesses. The will is not revoked as A had not the *animus revocandi*.

NOTE.—Revocation is in all cases a question of intention, and if the act done, though in itself sufficient to revoke a testamentary instrument, can be shown to have been done for a purpose other than revocation, it will not revoke the instrument. (Theobald on Wills, 7th Edn. p. 42).

(7) A testator draws lines across his will and writes on the back of it, "This is revoked." The will is not revoked. The writing must be signed by the testator and attested by two witnesses, *Cheese v. Lovejoy*, L. R. 2 P. D. 231.

(8) A testator writes at the foot of his will a memorandum to the effect that "This will was cancelled this day." The memorandum is signed by the testator and attested by two witnesses. The will is revoked, *In the goods of Fraser*, L. R. 2 P. & D. 40.

(9) A has made an unprivileged will. Afterwards A being entitled to make a privileged will makes a privileged will, which purports to revoke his unprivileged will. This is a revocation of the unprivileged will (ill. *it.*, sec 70).

Lost Will.—Where a will duly executed, and traced to the testator's possession and last seen there is not forthcoming on his death, the presumption is that it was destroyed by himself, *Anwar Hossein v. Secretary of State*, 31 Cal. 885; *Aditram v. Bapulal*, 45 Bom 906; *Sarat Chandra v. Golap Sundari*, 18 C. W. N. 527. This is the rule in *Welch v. Phillips*, 1 Moo. P. C. 299. In applying this rule in India considerable caution should be used in view of the habits and conditions of the Indians, *Padman v. Hanwanta*, 19 C. W. N. 929 (P. C.). To rebut it there must be sufficient evidence that it was not destroyed by the testator *animo revocandi*, *Allan v. Morrison*, (1900) A. C. 604. The presumption will be the same if the will is found mutilated or defaced, *Lambell v. Lambell*, 3 Hagg. 568. But if a will duly executed is destroyed in the lifetime of the testator without his authority or after his death, it may be established upon satisfactory proof being given of its having been so destroyed and also of its contents, *Trevelyan v. Trevelyan*, 1 Phillim. 149; *Sugden v. Lord St. Leonards*, (1876) 1 P. D. 154. Mere loss of the will does not operate as revocation. To establish revocation destruction by the testator must be shown, *Sarat Chandra v. Golap Sundari*, *supra*.

Hindus.—As regards Hindu Wills previously governed by the Hindu Wills Act the mode of revocation by marriage will not apply but the other modes prescribed in sec 70 *i. e.*, modes (2), (3) and (4) apply, and these modes are exhaustive, *Subba Reddi v. Doraisami*, 30 Mad. 369; see also *Chelikani v. Chelikani*, 29 I. A. 156. As regards Hindu Wills not governed by the Hindu Wills Act in addition to the modes prescribed above such a will may be revoked orally, *Maharajah Pertab v. Maharanee Subhao Kooer*, 3 Cal. 626 (P. C.). It would also be sufficient if a definite authority is given to the person with whom the will is deposited to destroy it even though the will be not destroyed, *Maharaja Pertab v. Maharanee Subhao Kooer*, *supra*. In *Raja Chelikani v. Raja Chelikani*, 29 I. A. 156 a Hindu will was executed in 1866 when the testator was very ill. He recovered and executed a power of attorney appointing a vakil to recover the will from the registry. By some blunder it was not recovered and the testator died. There was

evidence that the testator intended to destroy the will. It was held that the will had been revoked. In cases of nuncupative wills actual destruction or a formal revocation in writing is not essential to constitute a revocation. They may be revoked orally, *Venkayamma v. Venkata*, 25 Mad. 678 (P. C.).

Subsequent adoption by a Hindu of a son is no ground for revocation of a will made previously, *Vinayak v. Govindrav*, 6 B. H. C. 224, a. c. j.

Doctrine of Dependent Relative Revocation.—When a testator destroys his will or codicil with the intention of setting up a previous will or codicil executed by him, the *animus revocandi* or the intention to revoke is a conditional one, the condition being the validity of the document intended to be set up. If, therefore, the document intended to be set up is not a legal one, *e. g.*, if it is not validly executed, the subsequent will is not revoked. This is generally known as the doctrine of dependent relative revocation. The application of the doctrine is a question of intention which has to be ascertained from the language of the testator as found in his will, *Venkatanarayana v. Subbammal*, 39 Mad. 107 (P. C.). Unless and until the first document or writing is effectually revived there can be no revocation of the subsequent will. "Where it was evident that the testator, though using the means of revocation, could not intend it for any other purpose than to give effect to another disposition, if the instrument cannot have that effect it shall not be a revocation," *Ex-parte Ilchester*, 7 Ves. 379. In order that the doctrine of relative revocation may apply the act of destruction must be referable wholly and solely to the intention of setting up some other testamentary paper, and that testamentary paper is effectually revived, *e. g.*, if a testator executes a will on several sheets of paper and afterwards takes out one sheet and substitutes another in its place which is not signed or attested the doctrine will not apply and probate will be refused of the whole will, *Woodward v. Gouldstone*, 11 App. Ca. 469 at 477; *Treloar v. Lean*, 14 P. D. 49; *Ker v. Meakin*, 20 Bom. 370. See *Powell v. Powell*, (1866) L. R. 1 P. & D. 209.

Examples.

(1) A makes a will in 1862 which is unattested and a second will revoking the first in 1864 which is duly attested. In 1865 he destroys his will of 1864, his object being to set up the will of 1862. As the will of 1862 is not attested and therefore could not be set up, the second will is not revoked.

(2) A intending to make a new will revokes a will already made. A dies without making a new will. The revocation is complete. In order that the doctrine of dependent relative revocation may apply there must be the intention to set up a will *already* existing, and not a new will to be executed, *Williams v. Tyley*, (1859) Johns. 529.

(3) A obliterates the amount of legacy and writes over it another amount. These interlineations and obliterations are not initialled in the margin according to the requirements of sec. 71. They are therefore void and the original bequest will take effect, *Brooke v. Kent*, 3 Moo. P. C. 334. But if the name of the legatee is obliterated and another written over it, no case of dependent relative revocation will arise.

(4) A legacy is given by will to A, and by a codicil the legacy to A is revoked, and the same legacy is given to B. B predeceases the testator. The legacy to A is nevertheless revoked. In such a case no case of dependent relative revocation arises as there is nothing to show that the legacy to A was only to be revoked if the legacy to B was effectually made, *Tupper v. Tupper*, 1 K. & J. 665.

Effect of obliteration, interlineation or alteration in unprivileged will.

71. No obliteration, interlineation or other alteration made in any unprivileged will after the execution thereof shall have any effect, except so far as the words or meaning of the will have been thereby rendered illegible or undiscernible, unless such alteration has been executed in like manner as hereinbefore is required for the execution of the will:

Provided that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

(This is sec. 58 of the Succession Act X of 1925. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus who were formerly governed by the Hindu Wills Act.)

COMMENTARY.

Of Alterations, Interlineations, and Obliterations in a Will.—If a will contains any alterations, interlineations, or obliterations the same shall not have any effect except so far as the words or meaning of the will shall have been thereby rendered illegible or undiscernible.

The alterations, interlineations, or obliterations will only be given effect to in the following cases:—

(1) If the signature of the testator and of the attesting witnesses is made in the margin or on some part of the will opposite or near to such alterations; or

(2) If a memorandum is signed by the testator and by the attesting witnesses at the end or some other part of the will referring to such alterations. If these requisites are not complied with probate will be issued omitting the alterations, *Raghubar v. Ram Rakhan*, 1 C. W. N. 428.

Generally speaking, if a will contains alterations or erasures, the same will be deemed to have been made after the execution of the will, and if there is no evidence rebutting this presumption, they will not form part of the will, *Pandurang v. Vinayak*, 16 Bom. 652, unless the requisitions mentioned in sec. 78 are complied with. Marginal notes made by the testator in his will which are not signed and attested will not form part of the will, *Sardar Navroji v. Pullibai*, 15 Bom. L. R. 352. The section treats of alterations, etc., made after the execution of the will and not before, *In the goods of L. P. D. Broughton*, 29 Cal. 311. As to alterations made before execution they will be admitted to probate upon proof of evidence that the same were made before (*Coote's Probate Practice*, 15th Edn., p. 37).

Examples.

(1) A by his will bequeaths Rs. 1,000 to B. A cancels Rs. 1,000, and writes over it Rs. 500. The cancellation is not signed by A or attested. The alteration is void and the original bequest remains, i. e., B takes Rs. 1,000, *In the goods of Beaman*, 2 Curt. 353.

(2) A by his will bequeaths to B as follows: "I bequeath Rs. 1,000 to B." He pastes over these words a piece of paper and writes over it, "I bequeath Rs. 500 to C." The pasting is not signed or attested. The bequest to C is void. The pasted paper will not be directed to be removed to discover what was written below it. It also therefore gets nothing and probate will be issued in blank as to that legacy. If, however, only the amount of legacy is covered up with name untouched, the Court may remove the upper paper to discover what was written below it on the principle of dependent relative revocation, *In the goods of Horsford*, L. R. 3 P. & D. 211.

(3) A will is produced with blank spaces in its body for the names of legatees and the amount of legacies. Some of the blanks are filled in in different hand but the same are not initialled by the testator and the attesting witnesses. The will will be admitted to probate, the presumption will be that the blanks were filled up before execution; but the blanks that remain in the will will not be filled in by producing oral evidence of what the testator intended or otherwise.

(4) A makes certain alterations in the body of his will. The alterations are not signed. A afterwards executes a codicil in which he confirms the alterations made in the will. The alterations will be given effect to, *Tyler v. Merchant Taylors Co.*, 15 P. D. 216.

(5) A makes a will in his own hand on four sheets and pins them together and dates it. A afterwards removes the second page and substitutes a new page which contains a bequest to a person not born at the date of the will. *Held*: probate refused of the substituted page, *Ker v. Meakin*, 20 Bom. 370.

(6) A executes a will and afterwards make alterations therein with pencil. A thereafter executes a codicil confirming the will as altered. *Held*: probate granted of the will as altered, *In the goods of L. P. D. Broughton*, 29 Cal. 311.

72. A privileged will or codicil may be revoked by the testator by an unprivileged will or codicil, or by any act expressing an intention to revoke it and accompanied by such formalities as would be sufficient to give validity to a privileged will, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Explanation.—In order to the revocation of a privileged will or codicil by an act accompanied by such formalities as would be sufficient to give validity to a privileged will, it is not necessary that the testator should at the time of doing that act be in a situation which entitles him to make a privileged will.

(This is sec. 59 of the Succession Act X of 1865. That section applied to Hindus, etc., governed by the Hindu Wills Act, but it has now been omitted from Schedule III so as to bring it in conformity with sections 65 and 66 of this Act which do not apply to Hindus).

COMMENTARY.

Revocation of Privileged Wills.—A privileged will or codicil can be revoked as follows:—

(1) By an unprivileged will or codicil.

(2) By any act expressing an intention to revoke accompanied by such formalities as would be sufficient to give validity to a privileged will.

(3) By burning, tearing or destroying the will by the testator or by some person in his presence and by his direction with the intention to revoke it.

(4) By the marriage of the testator (sec. 69).

73. (1) No unprivileged will or codicil, nor any part thereof, which has been revoked in any manner, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same.

Revival of unprivileged will.

(2) When any will or codicil, which has been partly revoked and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as has been revoked before the revocation of the whole thereof, unless an intention to the contrary is shown by the will or codicil.

(This is sec. 60 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i.e., to Hindus who were formerly governed by the Hindu Wills Act).

COMMENTARY.

Of the Revival of Unprivileged Will and Codicil.—A will which is once revoked may be revived as follows:—

(1) By re-execution, i.e., by its being signed again by the testator and attested by two witnesses. This is called *republication*.

(2) By executing a codicil showing an intention to revive the will. The codicil *must show* an intention to revive the will by express words referring to the will. A will cannot be revived by mere implication. If the will is first partly revoked and then wholly revoked and then revived, the revival will operate only on the portion last revoked, unless there appears that the whole will is intended to be revived.

A codicil reviving a revoked will will not necessarily revive every codicil thereto, e.g., where a testator by 3rd codicil revoked first and second codicils and by the 4th codicil confirmed the will and the former codicils, it was held that only the will and the third codicil were revived, not the first and second, *Goods of Carritt*, 66 L. J. 379.

If a testator burns or destroys a will and afterwards executes a codicil which refers to the will with the intention of reviving it, the codicil cannot effect the revival, though there may be a draft of such a will, *Hale v. Tokelove*, 2 Rob. 318. The revoked will must be in existence, *Rogers v. Goodenough*, 2 Sw. & Tr. 342.

Consequences of Revival or Republication.—The Republication of a will is tantamount to the making of that will *de novo*; it brings down the will to the date of the republishing. In other words the will so republished is a new will as of the date of republication, sec. 34 of the English Wills Act is to that effect. There is no corresponding section under this Act. Consequently it revokes any will of a date prior to that of the republication, *Rogers v. Pittis*, 1 Add. 38. Another consequence

is that its operation is extended to subjects which have arisen between its date and republication, *e.g.* A, a bachelor by his will, gives a diamond ring to his wife Sarah. A afterwards marries Sarah and publishes the will again. Sarah will get the ring. A will which is revoked by the marriage of the maker will be revived by a codicil made after the marriage, though it does not expressly confirm or revive the will but refers merely to "the last will of me" and "my said will," no other will of the testator being in existence, *Neate v. Pickard*, 2 Notes of Cas. 406. Another consequence is that if it contains a clause revoking former wills all intermediate wills will be revoked (Mortimer on Probate p. 248).

CHAPTER VI.

Of the Construction of Wills.

Introduction.

The construction or interpretation of wills and especially wills written in vernacular languages of India has given occasion to innumerable cases and this branch of the law has become a baffling subject to lawyers and to students. It is however encouraging to note that the practice of construing one will by the interpretation put on another by a judicial tribunal has been condemned by their Lordships of the Privy Council and especially the practice of applying the rules of interpretation of English wills to wills executed by the natives of India. Lord Macnaghton in *Bhagabati v. Kali Charan*, 38 Cal. 468; 38 I. A. 54, condemns this practice in the following passage of his judgment, "It is no new doctrine that the rules established in English Courts for construing English documents are not as such to be applied to transactions between natives of India. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing. Rules of construction are rules designed to assist in ascertaining intention, and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied. It is a very serious thing to use such rules in interpreting the instruments of Hindus who view most transactions from a different point, think differently and speak differently from Englishmen and who have never heard of the rules in question." Again in *Norendra Nath v. Kamalbasini*, 23 Cal. 563, 23 I. A. 18, "To construe one will by reference to expressions of more or less doubtful import to be found in other wills is for the most part an unprofitable exercise. Happily that method of interpretation has gone out of fashion in this country. To extend it to India would hardly be desirable. To search and sift the heaps of cases on wills which encumber our English Law reports in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought, and brought up under different conditions of life seems almost absurd."

Again Sir Andrew Scoble in delivering the judgment in *Radha Prosad v. Ranimoni*, 35 Cal. 896, 35 I. A. 118, expressed as follows. "In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that his estate, especially an ancestral estate, shall be retained in his family, and it may be assumed that a Hindu

knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate."

And lastly in the very recent case, *Dinbai v. Nusserwanji*, 49 Cal. 1005 (P. C.), Lord Parmoor whilst interpreting the will of a Parsi reiterated the same opinion. Having regard to these expressions of opinion from the Highest Tribunal, from these commentaries innumerable cases of construction of English Wills have been omitted and this difficult branch is attempted to be simplified as much as possible.

There are two cardinal principles to be observed in construction of wills. The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. The second is that technical words or words of known legal import must have their legal effect, *Lalit Mohun v. Chukhun*, 24 Cal. 834 (P. C.). The primary duty of the court is to endeavour to ascertain the intention of the testator from the will itself and from the language used by him, *Narasimha v. Parthasarathy*, 37 Mad. 199 (P. C.). It is not for any Court to try to discover whether a will could not have been made more consonant with reason or with justice. Where a will has been made and is apparently in perfect form and the evidence of the attesting witnesses is to be trusted, few things can be more dangerous than to attempt to recreate the kind of will that the man ought in the opinion of the Court to have made, *Suna Ana v. S. R. M. Ramaswami*, 20 C. W. N. 673 (P. C.). The Court cannot make a will for the testator, the only thing it can do is that it will construe the will he has made, *Robertson v. Broadbent*, L. R. 8 H. L. 62. The rules embodied in this chapter of construction have been taken from important English decisions and are "so excellent that it can only be in very rare instances that the testator's intention will be liable to be defeated through his mistakes."

74. It is not necessary that any technical words or terms of art be used in a will, but only that the wording of will be such that the intentions of the testator can be known therefrom.

(This is sec. 61 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i.e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Rule 1.—No technical terms or terms of art are necessary to be used in a will. The wording shall be clear and unambiguous so that the intention of the testator can be known therefrom. But if technical words or words of known legal import are used they must have their legal effect, *Mary v. George*, 31 Mad. 283.

The first duty of the Court expounding the will is to ascertain not what the testator meant but *what is the meaning of the words* used by him. "It is very often said that the intention of the testator is to be the guide; but the expression is capable of being misunderstood and may lead to a speculation. The only and proper inquiry is what is the meaning of that which he has actually written," Lord Wensleydale, *Roddy v. Fitzgerald*, 6 H. L. Cas. 823. If the testator uses technical words, they will of course have their legal effect, *Lalit Mohun v. Chukhun*, 24 Cal. 834 (P. C.); unless such words are of such a nature as to make it clear that the testator did not mean to use technical terms in their technical sense, *Lakshmi Bai v. Ganpat*,

4 B. H. C. R. 150 o. c. j. The words "in trust" will not invariably create a trust, *Mary v. George*, 31 Mad. 283. When the language of the will is clear and consistent it shall receive its literal construction unless there is in the will itself something to suggest a departure from it, *Gurusami v. Sivakami*, 18 Mad. 347, 22 I. A. 119; e.g., where a testator by his will authorised his widow "to draw such sums of money as she may require for her maintenance," the widow is not entitled to draw any amount she likes but only such amount as should be necessary for the purpose, *Mary v. George*, *supra*.

The following vernacular expressions have acquired a technical meaning:—

Malik.—This word occurs mostly in the wills of the Bengalis but is also to be found in Gujarati and Hindi wills and it has been the subject of numerous decisions. But their Lordships of the Privy Council have now given a final stamp to this word and they have held that unless there is anything in the context of the will restricting its meaning the word "Malik" will convey an absolute heritable and alienable interest, *Lalit Mohun v. Chukkun Lal*, 24 I. A. 76; *Bhaidas Shivdas v. Bai Gulab*, 49 I. A. 1. In *Surajmani v. Rabi Nath*, 30 All. 84, 35 I. A. 17 their Lordships held that in order to cut down the full right that the word *malik* imports something must be found in the context to qualify it and the fact that the donee was a woman and a widow did not suffice. In *Bhaidas*' case their Lordships held that the word did not define the quality of the estate but the ownership of the estate and the word conferred an absolute estate, see also, *Musammam Sasinan v. Shib Narayan*, 1 Pat. 305 (P. C.); *Sudhamani v. Surat Lal*, 28 C. W. N. 541 (P. C.). In the following cases *malik* was held to convey absolute interest, *Chunilal v. Bai Muli*, 24 Bom. 420; *Padamlal v. Tek Singh*, 29 All. 217; *Lala Ramjewan v. Dal Koer*, 24 Cal. 406; *Amarendra v. Shuradhani*, 14 C. W. N. 458; *Sasiman v. Shib Narayan*, 24 Bom. L. R. 576, "Malik-o-Quabiz" absolute, *Fateh Chand v. Rup Chand*, 43 I. A. 183; "Malikatwa" absolute, *Rajnarain v. Ashutosh*, 27 Cal. 44 and *Rajnarain v. Katyayani*, 27 Cal. 649. "Malik-Wa-Khud-ikhtiyar" absolute, *Surajmani v. Rabi Nath*, 35 I. A. 17. "Kul Malik" absolute, *Lalbhai v. Mansukh*, 8 Bom. L. R. 482; "Nirbyndha Malik" absolute, *Sures Chandra v. Lalit Mohun*, 20 C. W. N. 464. In the following cases the word "Malik" was held to convey a limited interest, *Motilal v. Adv.-General*, 35 Bom. 279; *Shirinbai v. Ratanbai*, 43 Bom. 845; *Mithibai v. Meherbai*, 46 Bom. 162; *Punchoo Money v. Troylucko*, 10 Cal. 342; *Ashrafi v. Bidya Prashad*, 26 Bom. L. R. 776 (P. C.).

Poutra Poutradi.—Ordinarily these words are words of inheritance and will convey absolute interest, *Hori Dasi v Secretary of State*, 5 Cal. 228; *Gooroodas v. Sarat Chunder*, 29 Cal. 699; *Ram Saran v. Ram Narayan*, 42 Cal. 305, 46 Cal. 683 (P. C.). In *Ramlal v. Secretary of State*, 7 Cal. 304 (P. C.), 8 I. A. 47 it was held that they are words of inheritance and apply to male as well as female heirs. See also, *Lalit Mohun v. Chukkun Lal*, 24 Cal. 834 (P. C.). "Poutra Poutradi Santate" absolute, *Chandmal v. Vishvanath*, 24 Bom. L. R. 300; "Poutra Poutradi Krame" absolute, *Kartik Mandal v. Bama Charan*, 20 C. W. N. 182. In the following few cases these words were held not to convey absolute interest, *Lal Gajendra v. Lal Mathura*, 20 C. W. N. 876 (P. C.); *Ram Narayan v. Ram Saran*, 46 Cal. 683 (P. C.). "Auras Poutra Poutradi" were held to be words of limitation and not of inheritance, *Ekradeshwar v. Janeshwari*, 42 Cal. 582 (P. C.).

Waras.—This word would ordinarily convey an absolute interest, *Chunilal v. Bai Muli*, 24 Bom. 420. "Bapika Vausmathi," see *Dayabhai v. Chunilal*, 10 Bom. L. R. 97.

75. For the purpose of determining questions as to what person or what property is denoted by any words used in a will, a Court shall inquire into every material fact relating to the persons who claim to be interested under such will, the property which is claimed as the subject of disposition, the circumstances of the testator and of his family, and into every fact a knowledge of which may conduce to the right application of the words which the testator has used.

Inquiries to determine questions as to object or subject of will.

Illustrations.

(i) A, by his will, bequeaths 1,000 rupees to his eldest son or to his youngest grand-child, or to his cousin, Mary. A Court may make inquiry in order to ascertain to what person the description in the will applies.

(ii) A, by his will, leaves to B "my estate called Black Acre." It may be necessary to take evidence in order to ascertain what is the subject-matter of the bequest; that is to say, what estate of the testator's is called Black Acre.

(iii) A, by his will, leaves to B "the estate which I purchased of C." It may be necessary to take evidence in order to ascertain what estate the testator purchased of C.

(This is sec. 62 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act, with this addition that the words "son," "sons," "child" and "children" shall include an adopted child and the word grand-children shall include the children whether adopted or natural-born of a child whether adopted or natural-born, and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son; see Schedule III, cl. 5).

COMMENTARY.

Rule 1. Corollary.—This section is a corollary to rule I. As an aid to find out the intention of the testator from the words used in the will the court must, to use the words of their Lordships of the Privy Council, "consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense and many other things which are often summed up in the somewhat picturesque phrase, 'The court is entitled to put itself into the testator's arm chair.'" Among such surrounding circumstances which the Court is bound to consider none would be more important than race and religious opinions and the court is bound to regard as presumably present to the mind of the testator influences and aims arising therefrom. But all this is solely as an aid to arriving at a right construction of the will and to ascertain the meaning of its language. So soon as the construction is settled the duty of the court is to carry out the intentions as expressed and none other. The court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions they must be disregarded. If they leave any eventuality unprovided for the estate must in case that eventuality arises be dealt with according to the law. In all cases it must legally carry out the will as properly construed and this duty is

universal and is true alike of wills of every nationality and every religion or rank of life, *Narasimha v. Parthasarathy*, 37 Mad. 199 at p. 221 (P. C.).

The Court may, in such circumstances, inquiry into every material fact relating to the person who claims to be interested under the will and to the circumstances of the testator and of his family and affairs to identify the person intended by the testator, *Drake v. Drake*, 8 H. L. 172.

Illustrations.

(1) A testator makes a bequest to "my nephews and nieces." The testator had no nephews and nieces at the date of the will or at his death, but there were nephews and nieces of his wife. Evidence will be admissible to show that the words referred to the nephews and nieces of the testator's wife, *Sherratt v. Mountford*, L. R. 8 Ch. 928.

(2) A testator by his will made in 1891 devised his property to his wife for life and after her death "unto and to the use of John William Halston (otherwise Alston) the son of Israel Halston (otherwise Alston)" in fee simple. The testator died in 1899 and his widow, the tenant for life, in 1911. Israel Alston had a son called John William Alston who was born in 1874 and whose existence was known to the testator but who died 10 days after his birth, i. e., 17 years before the date of the will. This son's death was well-known to the testator. Israel Alston had another son named John Robert Alston who claimed the property. There was evidence that the son who died had received his name at the request of the testator and also that the testator desired that J. R. Halston should bear the name of John. Further that the testator had told J. R. Halston that the land would be his some day. *Held*, that the testator must have contemplated some person who was alive at the date of his will to be the object of his bounty and on the extrinsic evidence which was admissible the testator intended to devise the property to John Robert Halston, *In re Halston, Ewen v. Halston*, (1912) 1 Ch. 435.

(3) A testator gave legacies "to Mary, Elizabeth, and Ann, the daughters of Mary Benyon." At the date of the will Mary Benyon had two legitimate daughters Mary and Ann, and an illegitimate daughter Elizabeth. Elizabeth claimed the legacy as one of the persons fully answering the description. Extrinsic evidence was admitted to show that Mary Benyon formerly had a legitimate daughter named Elizabeth who died some years before the execution of the will, and that the testator did not know either of her death or of the birth of the illegitimate daughter. *Held*, Elizabeth was not entitled to the legacy. A testator cannot be taken to have meant to benefit a person of whose existence he was not aware, even if that person fully answers to the description, *Doe & Thomas v. Benyon*, 12 Ad. and E. 431, (see also *Ill. iii.*, to sec. 76).

Evidence.—Under this section therefore the only evidence that will become admissible is such evidence as will simply explain what the testator has written; but no evidence will be admitted to show what the testator should have written. The evidence must be of a *material fact* which will enable the court to ascertain the object of the testator's bounty or the subject of the bequest (see illustrations). Sec. 75 empowers the court to avail of extrinsic evidence for the purpose of determining questions as to what person or what property is denoted by any words used in a will, *Higgins v. Dawson*, (1902) A. C. 5. But when the testator has left no uncertainty as to the person to be benefited and the property by which the benefit is to be conferred the court is precluded from going outside the actual words used by the testator, *Pestonji v. Framji*, 12 Bom. L. R. 863. The evidence under this section is let in when the words are neither ambiguous nor obscure, *Charter v. Charter*, L. R. 7, H. L. 364; see also sec. 80. Where the words are ambiguous sec. 81 will apply. The distinction between this section and section 80 is that under this section

Varas.—This word would ordinarily convey an absolute interest, *Chunilal v. Bai Muli*, 24 Bom. 420. "Bapika Vausmathi," see *Dayabhai v. Chunilal*, 10 Bom. L. R. 97.

75. For the purpose of determining questions as to what person or what property is denoted by any words used in a will, a Court shall inquire into every material fact relating to the persons who claim to be interested under such will, the property which is claimed as the subject of disposition, the circumstances of the testator and of his family, and into every fact a knowledge of which may conduce to the right application of the words which the testator has used.

Inquiries to determine questions as to object or subject of will.

Illustrations.

(i) A, by his will, bequeaths 1,000 rupees to his eldest son or to his youngest grandchild, or to his cousin, Mary. A Court may make inquiry in order to ascertain to what person the description in the will applies.

(ii) A, by his will, leaves to B "my estate called Black Acre." It may be necessary to take evidence in order to ascertain what is the subject-matter of the bequest; that is to say, what estate of the testator's is called Black Acre.

(iii) A, by his will, leaves to B "the estate which I purchased of C." It may be necessary to take evidence in order to ascertain what estate the testator purchased of C.

(This is sec. 62 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act, with this addition that the words "son," "sons," "child" and "children" shall include an adopted child and the word grand-children shall include the children whether adopted or natural-born of a child whether adopted or natural-born, and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son; see Schedule III, cl. 5).

COMMENTARY.

Rule I. Corollary.—This section is a corollary to rule I. As an aid to find out the intention of the testator from the words used in the will the court must, to use the words of their Lordships of the Privy Council, "consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense and many other things which are often summed up in the somewhat picturesque phrase, 'The court is entitled to put itself into the testator's arm chair.'" Among such surrounding circumstances which the Court is bound to consider none would be more important than race and religious opinions, and the court is bound to regard as presumably present to the mind of the testator influences and aims arising therefrom. But all this is solely as an aid to arriving at a right construction of the will and to ascertain the meaning of its language. So soon as the construction is settled the duty of the court is to carry out the intentions as expressed and none other. The court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions they must be disregarded. If they leave any eventuality unprovided for the estate must in case that eventuality arises be dealt with according to the law. In all cases it must legally carry out the will as properly construed and this duty is

universal and is true alike of wills of every nationality and every religion or rank of life, *Narasimha v. Purilassamuthy*, 37 Mad. 199 at p. 221 (P. C.).

The Court may, in such circumstances, inquiry into every material fact relating to the person who claims to be interested under the will and to the circumstances of the testator and of his family and affairs to identify the person intended by the testator, *Drake v. Drake*, 8 H. L. 172.

Illustrations.

(1) A testator makes a bequest to "my nephews and nieces." The testator had no nephews and nieces at the date of the will or at his death, but there were nephews and nieces of his wife. Evidence will be admissible to show that the words referred to the nephews and nieces of the testator's wife, *Sacerriff v. Mountford*, L. R. 8 Ch. 928.

(2) A testator by his will made in 1891 devised his property to his wife for life and after her death "unto and to the use of John William Halston (otherwise Alston) the son of Israel Halston (otherwise Alston)" in fee simple. The testator died in 1899 and his widow, the tenant for life, in 1911. Israel Alston had a son called John William Alston who was born in 1874 and whose existence was known to the testator but who died 10 days after his birth, i. e., 17 years before the date of the will. This son's death was well-known to the testator. Israel Alston had another son named John Robert Alston who claimed the property. There was evidence that the son who died had received his name at the request of the testator and also that the testator desired that J. R. Halston should bear the name of John. Further that the testator had told J. R. Halston that the land would be his some day. *Held*, that the testator must have contemplated some person who was alive at the date of his will to be the object of his bounty and on the extrinsic evidence which was admissible the testator intended to devise the property to John Robert Halston, *In re Halston, Eves v. Halston*, (1912) 1 Ch. 435.

(3) A testator gave legacies "to Mary, Elizabeth, and Ann, the daughters of Mary Benyon." At the date of the will Mary Benyon had two legitimate daughters Mary and Ann, and an illegitimate daughter Elizabeth. Elizabeth claimed the legacy as one of the persons fully answering the description. Extrinsic evidence was admitted to show that Mary Benyon formerly had a legitimate daughter named Elizabeth who died some years before the execution of the will, and that the testator did not know either of her death or of the birth of the illegitimate daughter. *Held*, Elizabeth was not entitled to the legacy. A testator cannot be taken to have meant to benefit a person of whose existence he was not aware, even if that person fully answers to the description, *Doe & Thomas v. Benyon*, 12 Ad. and E. 431, (see also *ill. iii.*, to sec. 76).

Evidence.—Under this section therefore the only evidence that will become admissible is such evidence as will simply explain what the testator has written; but no evidence will be admitted to show what the testator should have written. The evidence must be of a *material fact* which will enable the court to ascertain the object of the testator's bounty or the subject of the bequest (see Illustrations). Sec. 75 empowers the court to avail of extrinsic evidence for the purpose of determining questions as to what person or what property is denoted by any words used in a will, *Higgins v. Dawson*, (1902) A. C. 5. But when the testator has left no uncertainty as to the person to be benefited and the property by which the benefit is to be conferred the court is precluded from going outside the actual words used by the testator, *Pestonji v. Framji*, 12 Bom. L. R. 863. The evidence under this section is let in when the words are neither ambiguous nor obscure, *Charter v. Charter*, L. R. 7, H. L. 364; see also sec. 80. Where the words are ambiguous sec. 81 will apply. The distinction between this section and section 80 is that under this

evidence admissible is the evidence of intention; under sec. 80 there is latent ambiguity and the evidence admissible is the evidence to eliminate the description applicable to two or more subjects or objects. This subject is further treated under sec. 80.

76. (1) Where the words used in a will to designate or describe a legatee or a class of legatees sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect.

(2) A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name.

Illustrations.

(i) A bequeaths a legacy "to Thomas, the second son of my brother John." The testator has an only brother named John, who has no son named Thomas, but has a second son whose name is William. William will have the legacy.

(ii) A bequeaths a legacy "to Thomas, the second son of my brother John." The testator has an only brother, named John, whose first son is named Thomas, and whose second son is named William. Thomas will have the legacy.

(iii) The testator bequeaths his property "to A and B, the legitimate children of C." C has no legitimate child, but has two illegitimate children, A and B. The bequest to A and B takes effect, although they are illegitimate.

(iv) The testator gives his residuary estate to be divided among "my seven children," and, proceeding to enumerate them, mentions six names only. This omission will not prevent the seventh child from taking a share with the others.

(v) The testator, having six grandchildren, makes a bequest to "my six grandchildren," and, proceeding to mention them by their Christian names, mentions one twice over omitting another altogether. The one whose name is not mentioned will take a share with the others.

(vi) The testator bequeaths "1,000 rupees to each of the three children of A." At the date of the will A has four children. Each of these four children will, if he survives the testator, receive a legacy of 1,000 rupees.

(This is sec. 63 of the Succession Act X of 1885. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act with this addition that the words "son," "sons," "child" and "children" shall include an adopted child, and the word "grand-children" shall include children whether adopted or natural-born of a child whether adopted or natural-born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son; see Schedule III, cl. 5).

COMMENTARY.

Rule II.—An error in the name or description of the legatee may be rectified and as a corollary to this rule the court may ascertain whether the gift to the person is gift to him *simpliciter* or conditional on his fulfilling a certain character.

Misdescription of the Object of the Bequest.—In cases of mistakes or misdescription in the names of the legatees the general rule is that if there is no reasonable doubt as to who was meant by the testator, the mistake in the name or

description shall not disappoint the bequest and the error may be rectified either (1) by the context of the will, or (2) to a certain extent by parol evidence.

(1) The mistake may be rectified by context, *e.g.*, name or the name and sex of the legatee may be obviated by the accuracy of his description and the maxim "*Falsa demonstratio non nocet*" may in such cases be very well applied. The maxim means that if there be an adequate and convenient description with convenient certainty of what was meant to pass or who was meant to be the legatee a subsequent erroneous addition will not vitiate it, *Webber v. Stanley*, 16 C. B. N. S. 698; *Santaya v. Savitri*, 4 Bom. L. R. 871; (*Jarman on Wills*, 5th Ed., p. 742).

But a mistake in a will cannot be corrected or an omission supplied, unless it clearly appears by fair inference from the whole will, *Philipps v. Chamberlaine*, 4 Ves. 57. But a clerical mistake can be corrected by Court when if uncorrected, it makes the will absurd, and the proper correction can be gathered from the context, *Re Northen's Estate*, 28 C. D. 153; *Morrell v. Morrell*, 7 P. D. 68. But where the testator had seen the words and adopted them the language of the will could not be changed, *Harter v. Harter*, L. R. 3 P. & D. 11; *Collins v. Elstone*, (1893) P. 1.

Evidence.—The principle underlying this section is that the mistake will be rectified by reference to the context in the will itself, and parol evidence will be admissible very rarely. In *Ewe v. Halston*, (1912) 1 Ch. 435 a legatee was described as "John William Halston" who was dead to the knowledge of the testator before the date of the will; evidence was admitted to show that the testator meant, John Robert Halston a brother of John William.

For the purpose of ascertaining the persons to take under certain names and descriptions evidence is admissible of the objects the testator was likely to benefit, *viz.*, that the testator was in the habit of using particular names or nick names towards such objects. For this purpose any documents or writings of the testator including a prior will are admissible. If some one fully answers the description given in the will, evidence to show that another was meant is not admissible, *Pestonji v. Framji*, 12 Bom. L. R. 863, *In the goods of Peel*, 2 P. and D. 46. But the mere fact that a person fully answers the description given in the will will not entitle him to take under it, if it appears that the testator was not aware of his existence.

The testator may have habitually called certain persons by peculiar names and of this evidence is admissible; but where a blank is left for the name of a legatee or merely single letters are used for the name of a legatee, no evidence of intention is admissible and the gift is void for uncertainty.

Where the legatee is inaccurately named or described, so that there is no one who fully answers the description, the Court will, if possible, gather from the contents of the whole will and the surrounding circumstances who was meant. If the legatee is mentioned by name and an erroneous description is added the name will prevail, if there is a person fully answering to the name and no one to answer the description, *Lalta Prasad v. Salig Ram*, 31 All. 5; *Murari Lal v. Kundan Lal*, 31 All. 339.

Gift to Persons filling a certain Character.—Where a gift is made, to a named legatee in a certain character, when there is no doubt as to the person

intended the misdescription shall not frustrate the bequest, *e.g.*, a legacy is given "to my wife A," the gift is not void, if the legatee does not happen to fill the character, *Giles v. Giles*, 1 Keen. 685; *Harris v. Brown*, 28 Cal. 621 (P. C.), 28 I. A. 159. But if the legatee fraudulently assumed the character for the purpose of deceiving the testator and procuring a legacy, and the character is presumed to be the motive of the testator's bounty, the legatee will be deprived of the legacy, *Melhuish v. Milton*, (1876) 3 Ch. D. 27; *Wilkinson v. Joughin*, L. R. 2 Eq. 319. (Williams on Executors, 10th Edn., p. 907).

Illustrations.

(1) A legacy is given by A "to my wife B." The wife procures a divorce after the execution of the will. The bequest to B nevertheless takes effect, *Re Boddington*, 25 Ch. D. 685. As the name is correct, description may be rejected.

(2) A, a bachelor bequeaths a legacy, "to my wife B." A afterwards marries B. The gift to B is void as the will is revoked by A's marriage.

NOTE.—Where there is a bequest to "my wife" the testator must be taken to consider that there was some person who could take under that designation. He cannot be supposed to refer to a future wife as subsequent marriage would revoke the will. Hence a reputed wife or a deceased wife's sister (before the passing of the Act in England) he may have married, will take, *In re Petts*, 27 Beav. 576; *Pratt v. Mathew*, 22 Beav. 328.

(3) A became engaged and was betrothed to B. By his codicil after mentioning B's name and alluding to his intended marriage with her he gave £3,000 "to my wife." A died before marriage. Held, B was entitled to the legacy, *Falsa demonstratio non nocet*, *Schloss v. Stiebel*, 6 Sim. 1.

(4) A testator left his property to his "children." He had no children. Evidence will be admitted to show that the testator was in the habit of calling his wife's children by a previous husband his children and they were intended to take under the description, *Re Deakin*, (1894) 3 Ch. 565. (Sec. 75)

(5) A bequest is made to B and C, the *legitimate* son and daughter of D. It appears that B and C were *illegitimate* children of D. B and C will nevertheless be entitled to the bequest. As the names are correct, error in description may be rejected, *Standen v. Standen* 2 Ves. 589. (Ill. iii., sec. 76).

(6) A, a testatrix, bequeaths her property to her husband B. B had a wife living when he married A and thus had deceived the testatrix. B shall not be entitled to the bequest, *Kennell v. Abbott*, 4 Ves. 802; *Allen v. McPherson*, 1 H. L. Cas. 191. But in such cases the Court must be satisfied that the assumed character was the motive for the bounty before it can deprive the legatee of his legacy.

(7) A, a testator, in consequence of the supposed affectionate conduct of his wife B, gives her a legacy mentioning her as his *chaste* wife. B was not chaste, of which fact A was deceived. B will nevertheless be entitled to the legacy, *Kennell v. Abbott*, 4 Ves. 802; *Ex parte Wallop*, 4 Bro. C. C. 90.

A gift to servants is not necessarily confined to servants living in the house. The term domestic servants will be confined to servants living in the house and would exclude out-door servants. A bequest to servants would be confined to those servants who were in the testator's service at his death. The servants who had been discharged before the testator's death or who had voluntarily left his service or dismissed are not entitled to anything. But a servant who at the testator's death has temporarily left his house and is to return to service is entitled to the legacy, *Herbert v. Reid*, 16 Ves. 481; *Suleman v. Dorab Alikhan*, 8 Cal. 1 (P. C.).

A legacy to "a son" of a person will go to the son living at the date of the will, and if there is no son living it goes to the first son born afterwards, if he survives the testator, *Powell v. Davies*, 1 Beav. 532.

If a legacy is bequeathed to the first or second son of a particular person they will take in order of birth. If all the sons born are living at the testator's death, the first born son will take under the term "first son" and second born son as the "second son." If the first or second son is dead at the date of the will, the term will mean first or second son at the testator's death, *King v. Bennett*, 4 M. & W. 36; *Powell v. Davies*, 1 Beav. 532; *Ashburner v. Wilson*, 17 Sim. 214. If a first or second son is born at or after the date of the will but dies in the testator's lifetime, a first or second surviving son will take, *Lomax v. Holmden*, 1 Ves. Sen. 290. (Theobald on Wills, 7th Edn. p. 278). "Eldest son," see *Richard Skinner v. Durga Prasad*, 31 All. 239; *Skinner v. Naunihal Singh*, 35 All. 211 (P. C.).

In the case of a testamentary gift to a class describing them as consisting of a specified number which is less than the number in existence at the date of the will, the Court rejects the specified number on the presumption of mistake and all the members of the class in existence at the date of the will are held entitled, unless it can be inferred who are the particular members intended in which case the Court holds those children entitled to the exclusion of others, *e. g.*, if a testator gives "to the three children of A the sum of £ 600 a-piece" and A had four children all born before the date of the will, the four children are entitled to receive £ 600 each, *Newman v. Piercey*, 4 C. D. 41.

Illustrations.

(1) A has three sons and one daughter. A bequest is made to the four sons of A. The daughter takes the bequest with the sons, *Lane v. Green*, 4 De G. & Sm. 239.

(2) A bequeaths Rs. 1,000 to each of the three children of A. At the date of the will, A has four children. Each of these four children shall, if he survives the testator, receive a legacy of 1,000 rupees, (III. vi., sec. 76).

(3) A testator bequeaths "to the two sons and the daughter of A B £50 a-piece." At the date of the will and at the death of the testator A B had one son and four daughters. Each of these five children shall receive £50, *Harrison v. Harrison*, 1 Russ. & M. 71.

NOTE.—The ground on which the Court proceeds in such cases is that there had been a mere slip in the expression used by the testator. The rule may also be stated thus: that in case of a testamentary gift to a class, describing them as consisting of a specified number which is less than the number in existence at the date of the will, the Court rejects the specified number on the presumption of mistake, and all the members of the class in existence at the date of the will are held entitled, unless it can be inferred who are the particular members intended in which case the Court holds those children entitled to the exclusion of the others, *Newman v. Piercey*, 4 C. D. 41. Note that in the above illustrations the number of children are calculated at the date of the Will and not the death of the testator, *e. g.*, if a testator makes a bequest to the three children of A simply and A has three children at the date of the will, and between the date of the will and the death of the testator a fourth child is born to A, the fourth child will not be entitled to the legacy.

Bequest to Persons whose Adoption is Invalid.—Where a bequest is made to a person who is described as an adopted son but he is not adopted or whose adoption is subsequently declared to be invalid, the validity of the bequest will depend on the intention of the testator, *Probodh Lal v. Harish Chandra*, 9 C. W. N. 309. If the intention is to benefit the individual irrespective of the adoption, he will

take it as *persona designata*, *Bireswar v. Ardha Chander*, 19 Cal. 452 (P. C.); *Nidhoomoni v. Saroda*, 3 I. A. 253; *Lali v. Murlidhar*, 28 All. 488 (P. C.); *Khub Singh v. Ramji Lal*, 41 All. 666; *Dhondubai v. Laxmanrao*, 47 Bom. 65; *Subbarayar v. Subbammal*, 24 Mad. 214, 27 I. A. 162; *Moorari Lal v. Kundan Lal*, 31 All. 339; *Lalta Prasad v. Salig Ram*, 31 All. 5; *Venkata v. The Court of Wards*, 1 Bom. L. R. 277 (P. C.). But if the adoption is the motive of the testator's bounty then the bequest will not take effect. *Karsondas v. Ladkavahu*, 12 Bom. 185 in appeal *Karamsi v. Karsandas*, 20 Bom. 718, and (P. C.) 23 Bom. 271; *Fanindra v. Rajeshwar*, 11 Cal. 463 (P. C.); *Shamarahoo v. Dwarkadas*, 12 Bom. 202; *Abbu v. Kuppmammal*, 16 Mad. 355; *In the case of The Court of Wards v. Venkata*, 20 Mad. 167, confirmed in Privy Council *Sri Raja Rao Venkata v. The Court of Wards*, 22 Mad. 383, the words "Aurasa Son" were held to be merely descriptive. The principle to be deduced from these cases is as pointed out in *Probodh Lal v.*

23 Bom. 296.

When words may be supplied.

77. Where any word material to the full expression of the meaning has been omitted, it may be supplied by the context.

Illustration.

The testator gives a legacy of "five hundred" to his daughter A, and a legacy of "five hundred rupees" to his daughter B. A will take a legacy of five hundred rupees.

(This is sec. 64 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act.)

COMMENTARY.

Ambiguity upon the Factum of the Will.—If there is an ambiguity upon the *factum* of the instrument, parol evidence may be admitted to explain the intention of the testator. By ambiguity upon the *factum* is meant, not an ambiguity upon the construction, but an ambiguity as to the foundation itself of the instrument, e. g., whether the testator meant a particular clause to be part of the instrument or whether it was introduced without his knowledge. But in order to justify the admission of parol evidence to explain an ambiguity upon the *factum* of an instrument, the ambiguity must be upon the face of the paper and the facts alleged and to be proved must completely remove the ambiguity. Also, if it is proved that certain words or clauses in the will were inserted by mistake or by fraud without the knowledge of the testator, the Court has power to correct the error by omission of words so inserted, but the Court has no power to supply words accidentally omitted from a will, *Harter v. Harter*, L. R. 3 P. & D. 11; *Morrell v. Morrell*, 7 P. D. 68; *Gopal Krishna v. Ramnath*, 5 Bom. L. R. 729. The rule is now settled that in cases of mistake the Court will strike out the words inserted by mistake but will never insert a word either as an addition or as a substitution except only to make the meaning of the expression clear by a reference to the context, *In the goods of Walkeley*, 69 L. T. 419; *In the goods of Schott*, (1901) P. 190; *Hormasji v. Dhanjishaw*, 12 Bom. L. R. 569; see also *Kirkpatrick*

v. Kirkpatrick, 13 Ves. 476; *Radford v. Radford*, 1 Keen. 486; *Lang v. Pugh*, 1 Y. & C. 718, where certain words have been supplied to make the meaning of the context clear. (See also ill. to this section). In *Tarachurn v. Suresh Chunder*, 17 Cal. 122 (P. C.), 16 I. A. 166 a contingent bequest "if my son died" was construed "if my son dies during minority." In *Abbott v. Middleton*, 7 H of L. 68 a contingent remainder "in case my son dies before his mother" was construed "in case my son dies before his mother without children."

78. If the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the will, but some parts of the description do not apply, such parts of the description shall be rejected as erroneous, and the bequest shall take effect.

Rejection of erroneous particulars in description of subject.

Illustrations.

(i) A bequeaths to B "my marsh-lands lying in L, and in the occupation of X." The testator had marsh-lands lying in L, but had no marsh-lands in the occupation of X. The words "in the occupation of X" shall be rejected as erroneous, and the marsh-lands of the testator lying in L will pass by the bequest.

(ii) The testator bequeaths to A "my zamindari of Rampur." He had an estate at Rampur, but it was a taluq and not a zamindari. The taluq passes by this bequest.

(This is sec. 65 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

79. If a will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be considered as limited to such property, and it shall not be lawful to reject any part of the description as erroneous, because the testator had other property to which such part of the description does not apply.

When part of description may not be rejected as erroneous.

Explanation.—In judging whether a case falls within the meaning of this section, any words which would be liable to rejection under section 78 shall be deemed to have been struck out of the will.

Illustrations.

(i) A bequeaths to B "my marsh-lands lying in L, and in the occupation of X." The testator had marsh-lands lying in L, some of which were in the occupation of X, and some not in the occupation of X. The bequest will be considered as limited to such of the testator's marsh-lands lying in L as were in the occupation of X.

(ii) A bequeaths to B "my marsh-lands lying in L, and in the occupation of X, comprising 1,000 bighas of lands." The testator had marsh-lands lying in L some of which were in the occupation of X and some not in the occupation of X. The measurement is wholly inapplicable to the marsh-lands of either class, or to the whole taken together. The measure-

ment will be considered as struck out of the will, and such of the testator's marsh-lands lying in L as were in the occupation of X shall alone pass by the bequest.

(This is sec. 66 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i, e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Rule III.—An error in the description of the *subject* of the bequest may be rectified.

Misdescription of the Subject of the Bequest.—In case of misdescription of the *subject* of the bequest the rule is that where the description is made up of more parts than one and one part is true but the other false, if the part which is true describe the subject-matter with sufficient certainty, the untrue part will be rejected and the bequest shall take effect, (Jarman on Wills; *Tulsha v. Mathura*, 33 All. 66). But there is a limitation to this rule, *viz.*, where the testator has several things and the description applies fully to one of such things and also in part to another of such thing, the bequest shall be limited to the first thing.

The following rules laid down in "Theobald on Wills" may also be borne in mind:—

(a) Where an object is sufficiently described additional words which have no application to anything may be rejected.

(b) Where there is a complete description and the testator goes on to add words for the purpose of identifying or elaborating the previous description, these words, if inconsistent with the previous description, may be rejected.

(c) Where there is one continuous description and there is something answering to part of it and something answering to another part, but the two together are inconsistent the question is which are the *leading* words of description. For the purpose of ascertaining leading words where a description is followed by restrictive words inconsistent with it, the earlier words will prevail. Where there is a restricted description of property followed by a wider description which would include other property as well the more restricted description will prevail. If there is a sufficient description the mention of a wrong survey number may be rejected, *Santaya v. Savitri*, 4 Bom. L. R. 871.

Illustration.

A testator devises to B his *freehold* estate situate at X. It turns out that the testator has no freehold estate at X but has *leasehold* estate at that place. The leasehold estate will pass to B, *Gully v. Davis*, L. R., 10 Eq. 562. A misdescription of tenure is immaterial, if in other respects the property is clearly identified, and there is no other property correctly answering the description in the will. This is only an inaccuracy and not ambiguity.

80. Where the words of a will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended,

Extrinsic evidence
admissible in cases of
patent ambiguity.

Illustrations.

(i) A man, having two cousins of the name of Mary, bequeaths a sum of money to "my cousin Mary." It appears that there are two persons, each answering the description in the will. That description, therefore, admits of two applications, only one of which can have been intended by the testator. Evidence is admissible to show which of the two applications was intended.

(ii) A, by his will, leaves to B "my estate called Sultanpur Khurd." It turns out that he had two estates called Sultanpur Khurd. Evidence is admissible to show which estate was intended.

(This is sec. 67 of the Succession Act X of 1865. In the margin the word "patent" appears instead of "latent" as in sec. 67 of the old Act, and it appears to be a misprint. This section applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act.)

Extrinsic evidence inadmissible in case of patent ambiguity or deficiency.

81. Where there is an ambiguity or deficiency on the face of the will no extrinsic evidence as to the intentions of the testator shall be admitted.

Illustrations.

(i) A man has an aunt Caroline, and a cousin, Mary, and has no aunt of the name of Mary. By his will he bequeaths 1,000 rupees to "my aunt, Caroline" and 1,000 rupees to "my cousin, Mary" and afterwards bequeaths 2,000 rupees to "my before-mentioned aunt, Mary." There is no person to whom the description given in the will can apply, and evidence is not admissible to show who was meant by "my before-mentioned aunt, Mary." The bequest is therefore void for uncertainty under section 89.

(ii) A bequeaths 1,000 rupees to _____ leaving a blank for the name of the legatee. Evidence is not admissible to show what name the testator intended to insert.

(iii) A bequeaths to B _____ rupees, or "my estate of _____." Evidence is not admissible to show what sum or what estate the testator intended to insert.

(This is sec. 68 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act.)

COMMENTARY.

Rule IV.—Extrinsic evidence is admissible to explain a latent ambiguity but not a patent ambiguity.

Admission of Extrinsic Evidence.—Extrinsic evidence is only admissible in case of *latent ambiguity*, i. e., if the words are unambiguous but they apply to two or more objects, one only of which is only intended. Two conditions are requisite:—(1) that the description applies to two or more persons or things, and (2) that the testator intended only one. If a description partly applies to one and partly to another, (*Hiscocks v. Hiscocks*, 5 M. & W. 363), or is wholly inapplicable to any of the persons or things, (*Miller v. Travers*, 8 Bing. 244), extrinsic evidence is not admissible. In *Indar Kunwar v. Jaipal Kunwar*, 15 Cal. 725, 15 I. A. 127, their Lordships of the Privy Council declined to receive extrinsic evidence as to whether the words "Maharani Sahiba" applied to the Senior Rani or Junior Rani, and held that the words only applied to Senior Rani and not both the Ranis. In *Krishnarao v. Benabai*, 20 Bom. 571, the Court declined to construe "children"

to mean "sons" as the word "children" was not ambiguous. Extrinsic evidence is not admissible in cases of *patent ambiguity*, i.e., an ambiguity on the face of the will, e. g., where blanks are left for names. Oral evidence is not admissible to show who was meant to be inserted.

The general rule is that parol evidence of the testator's intention is not admissible unless there is a latent ambiguity, e. g., to explain a nick-name, *Baylis v. Attorney-General*, 2 Atk. 239; but where a complete blank is left either for the name of the legatee or the amount of the legacy, no parol evidence will be allowed to fill in the blank (see ill. ii., sec. 81).

Words will not be added to give effect to what may be fancied to have been the intention of the testator, *Gopal Krishna v. Ramnath*, 5 Bom. L. R. 729.

Evidence of the declaration of a testator as to whom he intended to benefit, or supposed that he had benefited, can only be received where the description of the legatee or of the thing bequeathed is equally applicable in all its parts to two persons or to two things. But evidence of circumstances, the habits, and the state of the family at the time he made the will is admissible so as to put the Court in the position of the testator, in order to ascertain the bearing and the application of the language which he uses and whether there exists any person or thing to which the whole description given in the will can be with sufficient certainty applied, *Charter v. Charter*, L. R. 7 H. L. 364. Where a legatee is once correctly described in a will and the same name is mentioned again without any description, evidence is *not* admissible to show that a different person was intended, *Webber v. Corbett*, L. R. 16 Eq. 515. (Williams on Executors, 10th Edn. p. 905.)

If there are several persons who accurately answer the whole description, there is an equivocation, and evidence of the testator's intention is admissible, *Price v. Page*, 4 Ves. 680; *Miller v. Travers*, 8 Bing. 244; *Charter v. Charter*, L. R. 7 H. L. 364. But if the will shows which of the two persons are meant by the words used no case of equivocation arises and parol evidence is not admissible.

If a legatee has once been accurately described and the same name is afterwards mentioned without the description, evidence is not admissible to show that a different legatee of that name was meant, *Webber v. Corbett*, 16 Eq. 515. If the same words occur in different parts of the same will, they must be taken to have been used everywhere in the same sense, unless there appears a clear intention to the contrary.

If there is a gift by name, with a particular description superadded, and there is some one who answers to the name and some one who answers to the description, no evidence of intention is admissible. In such cases the name will prevail against an error in description if it is clear that there is an error in the description. Hence either the name or the description will prevail according as it is reasonably certain that the mistake is more likely to be made in the name than in the description and *vice versa*. If there is nothing to point out one person more than the other, the gift will be void for uncertainty, *Drake v. Drake*, 8 H. L. C. 172. (Theobald on Wills, 7th Edn.; pp. 267-269).

There is also another class of cases where extrinsic evidence is admissible, e. g., where there is an imputation of fraud in the making of the will. In such cases the

declarations of the testator are admissible in evidence respecting his dislike or affection for his relations or those who appear to be the objects of his bounty. Also in cases of alterations appearing on the face of the will declarations made *before* the execution of the will may be admitted, but not the declarations made *after* the execution of the will. In many cases, however, the declarations of a testator made *after* a will has been executed are admissible, and are most important in questions of testamentary capacity and fraud, *Nana v. Shanker*, 3 Bom. L. R. 465. (Williams on Executors, 10th Edn., pp. 256-263).

Illustrations

(a) A bequeaths a legacy thus, "to—Price the son of—Price" leaving the Christian name or the surname blank. Evidence will be admitted to show who was meant, *Price v. Page*, 4 Ves. 680; *In the goods of De Rosaz*, L. R. 2. P. D. 66.

(b) A legacy is given to Mr.—or to Lady—. Evidence will not be admitted to show who was meant. This is a case of patent ambiguity, *Baylis v. Attorney-General*, 2 Atk. 239; *Hunt v. Hort*, 3 Bro. C. C. 311

(c) A testatrix made her will on a printed form and after giving certain legacies gave all her estate real and personal unto—and to—own use absolutely and appointed C to pay all her debts and to be the executor of her will. The testatrix was illegitimate and left no issue or next-of-kin. The Crown and the executor claimed the residue. *Held*: parol evidence was admissible to prove that the testatrix believed that the effect of the blanks would be to entitle the executor to the residue, *Re Bacon's Will*, 31 C. D. 460.

(d) A testator appointed as executor his nephew A B. At the time of the execution of the will there was living a brother's son of the testator of that name and also a brother's son of the wife of the testator of the same name. The testator was not on terms of intimacy with his own brother's son but his wife's brother's son was living with the testator and was managing his estate. Evidence was admitted to show that the wife's brother's son was meant by the term nephew, *Grant v. Grant*, L. R. 5 C. P. 380. *Grant v. Grant*, is disapproved in *Merrill v. Morton*, 17 C. D. 382, and in *Re Taylor*, 31 C. D. 255, where it is held that the words "nephews" and "nieces" will be construed in the primary sense if there is any person answering the description. See also ill. f., to sec. 80.

(e) A testator by his will directed his executor out of Rs. 500 to disburse petty pensions to such poor "who have been mentioned to him—the executor—by me." *Held*: there was a deficiency on the face of the will as to the objects of benefit and no extrinsic evidence was admissible and the legacy failed, *Adm.-General v. Money*, 15 Mad. 448.

82. The meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other.

Meaning of clause to be collected from entire will.

Illustrations.

(i) The testator gives to B a specific fund or property at the death of A, and by a subsequent clause gives the whole of his property to A. The effect of the several clauses taken together is to vest the specific fund or property in A for life, and after his decease in B; it appearing from the bequest to B that the testator meant to use in a restricted sense the words in which he describes what he gives to A.

(ii) Where a testator having an estate, one part of which is called Black Acre, bequeaths the whole of his estate to A, and in another part of his will bequeaths Black Acre to B, the latter bequest is to be read as an exception out of the first as if he had said "I give Black Acre to B, and all the rest of my estate to A."

(This is sec. 63 of the Succession Act X of 1925 with the omission of the last sentence—“and for this purpose a codicil is to be considered as part of the will”—as being superfluous as codicil is defined under sec. 2 as forming part of the will. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Rule V.—The intention of the testator is to be ascertained by reading the whole will and for this purpose a codicil is to be considered a part of the will. As a corollary to this rule, see secs. 83 and 87. The Court will try to ascertain the intention of the testator *only* from the words and expressions used by him in the will. If the meaning of any particular clause is doubtful it may be collected from the entire will and for this purpose a codicil may be considered as a part of the will, *Somasundara v. Gangai*, 28 Mad. 386; *Rameshchandra v. Vijayaragavulu*, 31 Mad. 349. Effect must be given to every part of the will, if it is possible to put a reasonable construction upon it. The Court will never go against the express words used by the testator in his will, however noxious they may be to its own notions of equity and good conscience. The Court is bound to carry the will into effect, provided it is consistent with the rules of law, *Thellusson v. Woodford*, 4 Ves. 309. The intention of the testator is not to be set aside, because effect cannot be given to its full extent, but effect is to be given to it as far as possible. Where subsequent provisions are intended to control or override the previous ones effect must be given to the intentions of the testator by enforcing the subsequent provisions, *Somasundara v. Gangai*, *supra*.

In general it may be stated that whilst construing a particular clause, the whole framework of the will must be examined, the inclinations of the testator must be observed and the intention of the testator must be gathered from the words used by him in the will; clerical errors may be corrected and words and limitations may be transposed, supplied, or rejected, if the rejection or insertion is necessary to carry out the manifest intention of the will. (See Williams on Executors, 10th Edn., pp. 838-841.)

Again, when a Hindu testator by his will gives an authority to his wife to adopt a son to him, it does not necessarily follow that the widow takes a life estate, if there is nothing in the will to that effect, *Toolsi Dass v. Madan Gopal*, 28 Cal. 499. In other words, if the words of the will are clear an absolute bequest should not be cut down to a mere life interest, merely because the bequest is to a woman, *Atul Krishna v. Sanyasi*, 32 Cal. 1051; *Hoorbai v. Sooleman*, 3 Bom. L. R. 790.

83. General words may be understood in a restricted sense where it may be collected from the will that the testator meant to use them in a restricted sense; and words may be understood in a wider sense than that which they usually bear, where it may be collected from the other words of the will that the testator meant to use them in such wider sense.

Illustrations.

(1) A testator gives to A “my farm in the occupation of B,” and to C “all my marsh-lands in L.” Part of the farm in the occupation of B consists of marsh-lands in L,

and the testator also has other marsh-lands in L. The general words, "all my marsh-lands in L," are restricted by the gift to A. A takes the whole of the farm in the occupation of B, including that portion of the farm which consists of marsh-lands in L.

(ii) The testator (a sailor on ship-board) bequeathed to his mother his gold ring, buttons and chest of clothes, and to his friend, A (a shipmate), his red box, clasp-knife and all things not before bequeathed. The testator's share in a house does not pass to A under this bequest.

(iii) A, by his will, bequeathed to B all his household furniture, plate, linen, china, books, pictures and all other goods of whatever kind; and afterwards bequeathed to B a specified part of his property. Under the first bequest, B is entitled only to such articles of the testator's as are of the same nature with the articles therein enumerated.

(This is sec. 70 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 67, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Rule V. (Corollary).—And as a corollary to rule 5 general words may be understood in a restricted sense and *vice versa*.

Money includes bank notes, money at the bank on current and deposit accounts, cash in the house, money in the hands of an agent of the testator, and any money of which at the time of the testator's death, he might have claimed immediate payment, *Byrom v. Brandreth*, L. R. 16 Eq. 475. So under a bequest of "all my moneys" money due on deposit notes, money at the bank on current account, and also money in the hands of a stakeholder on a bet were held to pass, *Manning v. Purcell*, 1 Sm. and G. 284.

But money does not include an apportioned part of an annuity, nor accruing interest, nor a legacy which has not been acknowledged as at the disposal of the testator, nor stock, *Byrom v. Brandreth*, 16 Eq. 475; *Ommaney v. Butcher*, 1 Turn. & Russ. 270; *In re Mann*, *Ford v. Ward*, (1912) 1 Ch. 388.

In some cases a larger sense has been given to the term "money," and it has been held to pass the residuary personal property of the testator, *Oheda Lal v. Gobind Ram*, 30 All. 455. And it is also held to include stock. (See *In the goods of Hand*, 7 Notes of Cas. 60 and other cases cited in footnote (f) p. 938 Williams. on Executors 10th Edn.).

Ready Money will pass money at call at a bank or in the hands of an agent used as a banker, *Re Powell's Trusts*, Johns. 49; *Fryer v. Ranken*, 11 Sim. 55. It will not pass notes of hand, nor debt due from an agent, nor dividends not demanded, nor rent or interest due on a mortgage, *Fryer v. Ranken*, 11 Sim. 55; *Cooke v. Wagster*, 1 Sm. and G. 296.

Securities for Money will not pass a balance on current account at the bank, money on deposit account, shares, bank stock, mere debts, or money lent on mortgage where the legal estate is in the hands of trustees, and the testator is entitled only to the residue after certain payments, *Hopkins v. Abbott*, L. R. 19 Eq. 222; *Mayne v. Mayne*, (1897) 1 Ir. R. 324; *Hudleston v. Gouldsbury*, 10 Beav. 547.

But it passes a lien for unpaid purchase money, consols, and money lent on mortgage, the right to receive which is in the testator, and railway debenture stock, *Ogle v. Knipe*, 8 Eq. 434; *Bescoby v. Pack*, 1 Sim. & Stu. 500; *Ex-parte Barber*, 5 Sim. 451; *Callow v. Callow*, 42 Ch. D. 550. (See Theobald on Wills, 7th Edn., pp. 202, 208).

Debts.—In addition to the ordinary meaning, under a bequest of "whatever debts may be due to me at the time of my death," cash balance in his banker's hands will pass, *Carr v. Carr*, 1 Meriv. 541. Similarly under a bequest of "all and every sum of money which may be due to me at my decease" will pass damages recovered in an action by an executor for breach of covenant committed in the testator's lifetime (*Bide v. Harrison*, L. R. 17 Eq. 76), and money receivable under a policy of insurance on the testator's life, *Petty v. Willson*, L. R. 4 Ch. 574. A gift to A of a debt due from him means a debt due from him *solely*, if there is such a debt, and not a debt due from the firm to which A belongs (*Ex-parte Kirk, Re Bennett*, (1877) 5 C. D. 800). A direction that a debtor is to be released from all claims in respect of moneys "now owing" to the testator, and all other moneys due from him, will release the debtor from advances made subsequent to the date of the will, *Everett v. Everett*, 7 Ch. D. 428.

A bequest of a debt due to the testator from A means a debt due to the testator *alone*, and not the testator's share of a debt due from A to the testator's firm, *Maybery v. Brooking*, 7 De. G. M. & G. 673. (Theobald on Wills, 7th Edn., p. 204).

Furniture or Household Furniture includes such furniture as is reserved for domestic or personal use such as may contribute to the use or convenience of the householder or the ornament of the house, such as plate, linen, china, both useful and ornamental, and pictures, (*Kelly v. Powlett*, Ambl. 605); but not goods or plate in the possession of the testator in the way of his trade, nor books, nor wines, nor tenant's fixtures, nor horse and carriage. (See Williams on Executors, 10th Edn., pp. 933-935).

Household Goods.—By the expression "household goods" will pass everything of a *permanent* nature, *i. e.*, articles of household use which are not consumed in their enjoyment. But goods in the house, which are also goods in the way of his trade or business will not pass. Pictures, plates, clock, etc., will pass but malt, hops, victuals, guns and pistols will not pass. (See Williams on Executors, 10th Edn., pp. 930-933).

Goods and Chattels.—When construed in the abstract, goods and chattels will comprehend all the personal estate of the testator, as stock, bond, notes, money, plate, furniture, &c. But the words must be regulated by the context, and, if they occur after the enumeration of several articles, they must be limited and construed *eiusdem generis*.

Effects and Property.—Similarly these words standing alone will pass the whole of the testator's residuary property, *Campbell v. Prescott*, 15 Ves. 507.

Good-will.—A gift of a good-will and business does not pass the capital in the business, nor the book debts, nor stock in trade, *Delany v. Delany*, 15 L. R. Ir. 55; *Blake v. Shaw*, John. 732.

84. Where a clause is susceptible of two meanings according to one of which it has some effect, and according to the other of which it can have none, the former shall be preferred.

Which of two possible constructions preferred.

(This is sec. 71 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Rule VI.—If a clause is susceptible of two meanings one of which destroys and the other preserves equity will lean towards that meaning which preserves rather than towards the other which destroys and as a corollary to this rule where two clauses are irreconcilable so that they cannot stand together the rule is the last prevails, see sec. 88, *Langston v. Langston*, 2 Cl. & F. 194; *Advocate-General v. Hormusji*, 29 Bom. 375.

85. No part of a will shall be rejected as destitute of meaning if it is possible to put a reasonable construction upon it.

No part rejected, if it can be reasonably construed.

(This is sec. 72 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

86. If the same words occur in different parts of the same will, they shall be taken to have been used everywhere in the same sense, unless a contrary intention appears.

Interpretation of words repeated in different parts of will.

(This is sec. 73 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Rule VII.—No part of the will is to be rejected if it is possible to put a reasonable construction on it, and the same words occurring in different parts of the will shall bear the same meaning.

For Indian cases on the rule, see, *Jairam v. Kesonjee*, 4 Bom. L. R. 555, where the word "owner" occurring in different parts of the will was construed; *Krishnarao v. Benabai*, 20 Bom. 571 for "children." For intention to contrary, see *Ballin v. Ballin*, 7 Cal. 218.

87. The intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

Testator's intention to be effectuated as far as possible.

Illustration.

The testator by a will made on his death-bed bequeathed all his property to C D for life and after his decease to a certain hospital. The intention of the testator cannot take effect to its full extent, because the gift to the hospital is void under section 118, but it will take effect so far as regards the gift to C D.

(This is sec. 74 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

This section is a corollary to rule five, *viz.*, that the intention of the testator is to be gathered from the entire will.

88. Where two clauses or gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

The last of two inconsistent clauses prevails.

Illustrations.

(i) The testator by the first clause of his will leaves his estate of Ramnagar "to A," and by the last clause of his will leaves it "to B and not to A." B will have it.

(ii) If a man at the commencement of his will gives his house to A, and at the close of it directs that his house shall be sold and the proceeds invested for the benefit of B, the latter disposition will prevail.

(This is sec. 75 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

This section is a corollary to rule VI stated under sec. 84. The general rule is that where there is a repugnancy the first word in a deed and the last word in a will shall prevail, *Advocate-General v. Hormusji*, 29 Bom. 375. This rule is to be applied strictly and the two inconsistent clauses must refer to the same subject matter; the rule is not to be applied where the two clauses are intended to provide for different circumstances, *Damodardas v. Dayabhai*, 22 Bom. 833, *e. g.*, if in the first clause of the will the property is given to A and in the subsequent clause it is given to B for life, in such a case both the clauses will be given effect to and the construction will be that the bequest will be to B for life and then to A absolutely, *Doe v. Davies*, 4 M. & W. 599. Again both the clauses must be absolutely irreconcilable, see ill. (i) and the words "not to A." Therefore if a testator in the first part of his will devises his land to A absolutely and in another part he devises the same land to B, A and B will both take the property jointly, *Ridout v. Pain*, 3 Alk. 486.

89. A will or bequest not expressive of any definite intention is void for uncertainty.

Will or bequest void for uncertainty.

Illustration.

If a testator says "I bequeath goods to A," or "I bequeath to A," or "I leave to A all the goods mentioned in the Schedule" and no Schedule is found, or "I bequeath money," "wheat," "oil," or the like, without saying how much, this is void.

(This is sec. 76 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Of Uncertainty.

Inconsistent Wills.—The first portion of the section relates to inconsistent wills, *e.g.*, if two inconsistent wills be found of the same date, or without any date, and no evidence is forthcoming, establishing the posteriority of the execution of

either, both wills are void for uncertainty and the deceased must be considered to have died intestate.

Inconsistent Bequests.—The second portion of the section relates to uncertain bequests. If it is impossible to ascertain the *subject-matter* or the *object* of a bequest, the bequest will be void for uncertainty. If the subject-matter of the bequest is described in vague and general terms or if the bequest is of an indefinite amount, *e. g.*, a bequest of "some of my linen" or of "a handsome gratuity," the bequest is void for uncertainty, *Surbomungola v. Mohendronath*, 4 Cal. 508; *Peck v. Halsey*, 2 P. Wms. 387; *Jubber v. Jubber*, 9 Sim. 503. But if the will indicates some reasonable grounds for ascertaining the amount of the gift the Court will try to ascertain it, *e. g.*, a bequest "to A of £500 or £100" will be construed in favour of the legatee as a gift of the larger sum, *Seale v. Seale*, 1 P. Wms. 290. Also a gift of "a sum of money to an executor for his trouble" is good and the Court will fix the amount, *Jackson v. Hamilton*, 3 J. & Lat. 702; *Gokool Nath v. Issur Lochun*, 14 Cal. 222. (Theobald on Wills, 7th Edn. p. 757).

Uncertainty in regard to the objects of a bequest arises either from the testator having described such objects by a vague term or if a definite class is the object of the bequest, it is intended that all the members of the class are not to take the gift, *e. g.*, a gift to one of the sons of A is void for uncertainty, though only one son may be alive at the testator's death and parol evidence is not admissible to show which of the sons was intended, *Strode v. Russell*, 2 Vern. 621; *In the goods of Blackwell*, (1877) 2 P. D. 72. (Theobald on Wills, 7th Edn. p. 758).

Uncertainty in connection with Charitable Bequests.—Uncertainty has played not a small part in the construction of bequests to charity and many bequests are held to be void on account of uncertainty as to the objects specified or the amount bequeathed. In the well known case of *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 521 a bequest to executors of a certain sum of money to be spent by them at their absolute discretion upon objects of liberality or benevolence or for purposes of general utility or for hospitality and charity was held to be too vague and therefore void. But in *Advocate-General v. Hormusji*, 29 Bom. 375 a bequest of a certain sum of money to the trustees upon trust to be expended by them for such charitable purposes as they may think fit was held to be a good bequest and not void for uncertainty, see also, *Parbati v. Ram Barun*, 31 Cal. 895. Again in *Trikumdas v. Haridas*, 31 Bom. 583 a bequest of residue in the following words—"As to whatever immoveable and moveable property belonging to me in excess or may remain over as surplus my abovenamed executors are to make use of the same in such manner as they may unanimously think proper for purposes of popular usefulness or for purposes of charity"—was held to be bad for uncertainty. Following this case in *Sarat Chandra v. Pratap Chandra*, 40 Cal. 232 a bequest of a certain sum "to be applied in supporting the blind and the destitute and for imparting education, in removing marriage difficulties or in works of public good, etc." was held to be void for uncertainty. In *Bai Chadunbai v. Dady*, 26 Bom. 632 a testator directed that after the death of his wife his trustees should bestow certain property of his and the income thereof "upon some one or more charitable educational or other philanthropic institution calculated to promote the public good as they shall in their discretion select" was held to be void. But in *Smith v. Massey*, 30 Bom. 500 a bequest to trustees to be used by them "in such charities as the trustees may think deserving" was held to be good, see also *Gangabai v. Thavar Mulla*, 1 Bom. H.C. R.

COMMENTARY.

This section is a corollary to rule five, *viz.*, that the intention of the testator is to be gathered from the entire will.

88. Where two clauses or gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

The last of two inconsistent clauses prevails.

Illustrations.

(i) The testator by the first clause of his will leaves his estate of Ramnagar "to A," and by the last clause of his will leaves it "to B and not to A." B will have it.

(ii) If a man at the commencement of his will gives his house to A, and at the close of it directs that his house shall be sold and the proceeds invested for the benefit of B, the latter disposition will prevail.

(This is sec. 75 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

This section is a corollary to rule VI stated under sec. 84. The general rule is that where there is a repugnancy the first word in a deed and the last word in a will shall prevail, *Advocate-General v. Hormusji*, 29 Bom. 375. This rule is to be applied strictly and the two inconsistent clauses must refer to the same subject matter; the rule is not to be applied where the two clauses are intended to provide for different circumstances, *Damodardas v. Dayabhai*, 22 Bom. 833, *e. g.*, if in the first clause of the will the property is given to A and in the subsequent clause it is given to B for life, in such a case both the clauses will be given effect to and the construction will be that the bequest will be to B for life and then to A absolutely, *Doe v. Davies*, 4 M. & W. 599. Again both the clauses must be absolutely irreconcilable, see ill. (i) and the words "not to A." Therefore if a testator in the first part of his will devises his land to A absolutely and in another part he devises the same land to B, A and B will both take the property jointly, *Ridout v. Pain*, 3 Alk. 486.

89. A will or bequest not expressive of any definite intention is void for uncertainty.

Will or bequest void for uncertainty.

Illustration.

If a testator says "I bequeath goods to A," or "I bequeath to A," or "I leave to A all the goods mentioned in the Schedule" and no Schedule is found, or "I bequeath 'money,' 'wheat,' 'oil,' or the like, without saying how much, this is void.

(This is sec. 76 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Of Uncertainty.

Inconsistent Wills.—The first portion of the section relates to inconsistent wills, *e.g.*, if two inconsistent wills be found of the same date, or without any date, and no evidence is forthcoming, establishing the posteriority of the execution of

either, both wills are void for uncertainty and the deceased must be considered to have died intestate.

Inconsistent Bequests.—The second portion of the section relates to uncertain bequests. If it is impossible to ascertain the *subject-matter* or the *object* of a bequest, the bequest will be void for uncertainty. If the subject-matter of the bequest is described in vague and general terms or if the bequest is of an indefinite amount, *e. g.*, a bequest of "some of my linen" or of "a handsome gratuity," the bequest is void for uncertainty, *Surbomungola v. Mohendronath*, 4 Cal. 508; *Peck v. Halsey*, 2 P. Wms. 387; *Jubber v. Jubber*, 9 Sim. 503. But if the will indicates some reasonable grounds for ascertaining the amount of the gift the Court will try to ascertain it, *e. g.*, a bequest "to A of £500 or £100" will be construed in favour of the legatee as a gift of the larger sum, *Seale v. Seale*, 1 P. Wms. 290. Also a gift of "a sum of money to an executor for his trouble" is good and the Court will fix the amount, *Jackson v. Hamilton*, 3 J. & Lat. 702; *Gokool Nath v. Issur Lochun*, 14 Cal. 222. (Theobald on Wills, 7th Edn. p. 757).

Uncertainty in regard to the objects of a bequest arises either from the testator having described such objects by a vague term or if a definite class is the object of the bequest, it is intended that all the members of the class are not to take the gift, *e. g.*, a gift to one of the sons of A is void for uncertainty, though only one son may be alive at the testator's death and parol evidence is not admissible to show which of the sons was intended, *Strode v. Russell*, 2 Vern. 621; *In the goods of Blackwell*, (1877) 2 P. D. 72. (Theobald on Wills, 7th Edn. p. 758).

Uncertainty in connection with Charitable Bequests.—Uncertainty has played not a small part in the construction of bequests to charity and many bequests are held to be void on account of uncertainty as to the objects specified or the amount bequeathed. In the well known case of *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 521 a bequest to executors of a certain sum of money to be spent by them at their absolute discretion upon objects of liberality or benevolence or for purposes of general utility or for hospitality and charity was held to be too vague and therefore void. But in *Advocate-General v. Hormusji*, 29 Bom. 375 a bequest of a certain sum of money to the trustees upon trust to be expended by them for such charitable purposes as they may think fit was held to be a good bequest and not void for uncertainty, see also, *Parbati v. Ram Barun*, 31 Cal. 895. Again in *Trikumdas v. Haridas*, 31 Bom. 583 a bequest of residue in the following words—"As to whatever immoveable and moveable property belonging to me in excess or may remain over as surplus my abovenamed executors are to make use of the same in such manner as they may unanimously think proper for purposes of popular usefulness or for purposes of charity"—was held to be bad for uncertainty. Following this case in *Sarat Chandra v. Pratap Chandra*, 40 Cal. 232 a bequest of a certain sum "to be applied in supporting the blind and the destitute and for imparting education, in removing marriage difficulties or in works of public good, etc." was held to be void for uncertainty. In *Bai Chadunbai v. Dady*, 26 Bom. 632 a testator directed that after the death of his wife his trustees should bestow certain property of his and the income thereof "upon some one or more charitable educational or other philanthropic institution calculated to promote the public good as they shall in their discretion select" was held to be void. But in *Smith v. Massey*, 30 Bom. 500 a bequest to trustees to be used by them "in such charities as the trustees may think deserving" was held to be good, see also *Gangabai v. Thavar Mulla*, 1 Bom. H.C. R.

71. In *Burbomungola Dabee v. Mohendronath*, 4 Cal. 508, a direction in a will to the executors to lay out such portion of the estate as the executors think fit towards charitable purposes was held to be too vague and uncertain, as also a direction to use a certain sum in a good work—"sara kam"—was held to be void for uncertainty, *Bai Bapi v. Jamnadas*, 22 Bom. 774; see also *Jamnabai v. Dharsey*, 4 Bom. L. R. 893; *Blair v. Duncan*, (1902) A. C. 37; In *Adv.-General v. Jimbabai*, 41 Bom. 181, the testator directed his executors to set apart rupees three lacs and to invest them in Government Securities and to spend the same in connection with some good works or charity in such manner as they might think just and proper such as hospital, sanitarium, suvavadkhana (Maternity homes), musafarkhana, Madressa, etc., in connection with any Khairat work, it was held that the bequest was not void for uncertainty. But a direction to set apart a specific sum for distribution among testator's poor relations, dependents and servants is a valid charitable bequest, *Manorama v. Kali Charan*, 31 Cal. 166; *Prafulla Chunder v. Jogendra*, 9 C. W. N. 528. Also a direction to spend the income of a certain fund in feeding the poor and indigent is valid, *Rajendra v. Raj Coomari*, 34 Cal. 5; *Kedar Nath v. Atul Krishna*, 12 C. W. N. 1083.

In *Runchordas v. Parvatibai*, 23 Bom. 725 (P. C.), 26 I. A. 71, their Lordships of the Privy Council held that a bequest for "Dharam" was void for uncertainty, and following this decision the Madras High Court in *Parthasarathy v. Thiruvengada*, 30 Mad. 340, held that a bequest to "Dharama" was void for uncertainty (Subrahmania Ayyar, J. dissenting); see also, *Devshankar v. Motiram*, 18 Bom. 136; *Morarji v. Nenbai*, 17 Bom. 351 and *Vundravandas v. Cursondas*, 21 Bom. 646. However, in the latest Privy Council case of *Vaidyanatha v. Swaminatha*, 26 Bom. L. R. 1121 at 1126 a bequest to "Dharmam" in connection with the context of the will was held not to be void for uncertainty. A Hindu bequeathed a certain sum of money to be spent every year "either for the spread of the Sanskrit language or for the spread of Hindu religion or for both." It was held that the trust as regards the spread of Sanskrit language was not void for uncertainty but the trust for the spread of Hindu religion was void and as the whole sum was directed to be spent either for the spread of Hindu religion or for the spread of the Sanskrit language or for either or for both the whole gift was void for uncertainty, *Venkata v. Subba Rao*, 46 Mad. 300; see also *Chandi Charan v. Haribola* 46 Cal. 951.

The *ratio decidendi* deducible from these cases is this:—Where charitable purposes are mixed up with other purposes of such shadowy and indefinite nature that the Court cannot execute them, such as "charitable or benevolent," or "charitable or philanthropic," or "charitable or pious," or "charitable or public" purposes, or where the description includes purposes which may or may not be charitable and a discretion is vested in the trustees, the whole gift fails for uncertainty. *Blair v. Duncan* (1902) A. C. 37; *Da Costa, Re Clarke v. Church of England Collegiate School of St. Peter*, (1912) 1 Ch. 337. But if the bequest is purely and wholly charitable, effect will be given to it, *Smith v. Massey*; *Advocate-General v. Hormusjee*; *Parbati v. Ram Barun*, *supra*; *Gordhan Das v. Chunni Lal*, 30 All. 111. The test to be applied in all such cases is that if the testator's meaning is so extremely vague that the execution of his purpose would practically amount to some one else making a will for him then the Court will not lend its assistance, *Venkata v. Subba Rao*; *Sarat Chandra v. Pratap Chandra*; *Bai Chadunbai v. Dady*,

supra, and *Grimond v. Grimond*, (1905) A. C. 124. But where the will gives an indication of the intention of the testator as to the approximate quantum of the bequest and the nature and object of the bequest, effect will be given to it, *Gokool Nath v. Issur Lochun*, 14 Cal. 222; *Rojomoyee v. Troylukho*, 29 Cal. 260; *Gangabai v. Thavar Mulla, supra*; *Advocate-General v. Jimbabai*, 41 Bom. 181.

90. The description contained in a will of property, the subject of gift, shall, unless a contrary intention appears by the will, be deemed to refer to and comprise the property answering that description at the death of the testator.

Words describing subject refer to property answering description at testator's death.

(This is sec. 77 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

This section does not vary any mode of construction according to Hindu Law; hence even in case of Hindu Wills not governed by the Hindu Wills Act the same rule will apply, *Jitendra v. Nritya*, 18 C. W. N. 140. This section deals with the subject matter of the gift and not the object.

Rule VIII.—A will speaks from the death of the testator and not from the date of the execution.

Of the Time from which Wills Speak.—A will speaks from the death of the testator, as it only comes into operation then, *Bodi v. Venkataswami*, 38 Mad. 369. Hence the description of the subject-matter of the gift contained in the will shall be deemed to refer to and comprise the property answering that description at the death of the testator, unless there is a contrary intention appearing in the will. The rule is that a will shall be construed to speak and take effect as if it had been executed immediately before the death of the testator. To prevent the application of this rule, an intention must be shown excluding the effect given by it, *e. g.*, in a will bearing a particular date, the testator gave "all the estate of which I am now possessed" and used the word "now" in other parts of the will, apparently alluding to the period at which he was making the will, it was held that the testator had indicated a contrary intention, and that the property acquired after the date of the will was not affected by the will, *Cole v. Scott*, 1 Mac. & G. 518.

In case of a specific bequest, if the testator showed a clear intention to dispose of such goods as belonged to him in a particular place at the date of his will, property afterwards brought there would not pass, *Dormer v. Burnet*, Amb. 281. It must, however, be noted that the word "now" does not always imply a contrary intention. The intention must be gathered from the text of the will, *e. g.*, if a testator devised "all my flock of sheep now on such a hill or in such a pasture," the word "now" would not indicate a contrary intention, because sheep are in their nature fluctuating, some must die, some must be killed, and some lambs be produced, and being a case of a collective body, the sheep produced afterwards will also pass, *All Souls' College v. Coddington*, 1 P. Wms. 597; *Wagstaff v. Wagstaff*, L. R. 8 Eq. 229; *Douglas v. Douglas*, Kay 400; see also, *Bai Jaiji v. Macleod*, 30 Bom. 493 for the construction of the word "such."

In some cases, even though no contrary intention appears on the face of the will, still from the inaptness of the description, after acquired property may be excluded, *e. g.*, where A devised "my cottage and all my land at S," and A subsequently contracted to purchase a large mansion house at S, the mansion must be excluded, *Re Portal and Lamb*, 30 C. D. 50; *In Re Knight*, 34 Ch. D. 518. (Williams on Executors, 10th Edn. pp. 151-156).

This section as stated above deals with the subject of the bequest. But the same principles which govern the construction of words descriptive of subjects must also apply to words descriptive of objects, *e. g.*, if a testator make a bequest to his son John the bequest will take effect in favour of his son of that name at the date of the will and of him only, *Amyot v. Dwarries*, (1904) A. C. 268. Similarly where there is a bequest to "my wife" the testator must be deemed to consider his wife at the date of the will. He cannot be supposed to refer to a future wife as marriage subsequent to will would revoke the will under sec. 69. Again if a bequest is made to the wife of B and B had a wife C living at the date of the will and C died in the lifetime of the testator and B married a second wife D, D is not entitled to the legacy, *Boreham v. Bignall*, 8 Ha. 131; *Burrows Trusts*, 10 L. T. N. S. 184.

Where a bequest is made to the wife of a third person, the rules are these:—

(i) If the third person has a wife living at the date of the will, the bequest will be confined to her only and if she dies the after-taken wife will not be entitled to the legacy.

(ii) If the third person has no wife living at the date of the will, any wife living at the death of the testator shall take the legacy.

(iii) If the third person has no wife living at the date of the will or at the death of the testator any woman with whom the third person shall first marry shall be entitled to the legacy. (Jarman on Wills, 6th Edn. p. 398). Under the Succession Act in the last case the bequest would be void. (See ill. i., sec. 112).

Accordingly where a Hindu by his will bequeathed portions of his property to the wives of his unmarried sons and the sons subsequent to the testator's death married persons who had been born when the testator was alive it was held that the bequest was void according to Hindu Law, *Dines Chandra v. Biraj Kamini*, 15 C. W. N. 945.

In the case of a gift to "a son" or "a child" of a person, it will go to the son or child if there is one in existence at the time of making the will, and if there is no son or child living at the date of the will, it will go to the first son or child who comes into existence before the death of the testator or at the period of distribution.

A testator devised his property to A for life and after his death the property was directed to be divided into four parts between one child of A, one child of B, one child of C, and one child of D. At the time of the making of the will and of the death of the testator B only had a child, namely, a daughter. But after the testator's death and at the death of A there were children, both sons and daughters of A, C, and D. Held, that the gift to one child was not void for uncertainty and that the eldest child of A, C, and D, whether a son or daughter, were entitled to the property, *Powell v. Davies*, 1 Beav. 532; *Ashburner v. Wilson*, 17 Sim. 204.

91. Unless a contrary intention appears by the will, a bequest of the estate of the testator shall be construed to include any property which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power; and a bequest of property described in a general manner shall be construed to include any property to which such description may extend, which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power.

Power of appointment executed by general bequest.

(This is sec 78 of the Succession Act X of 1865.)

92. Where property is bequeathed to or for the benefit of certain objects as a specified person may appoint or for the benefit of certain objects in such proportions as a specified person may appoint, and the will does not provide for the event of no appointment being made; if the power given by the will is not exercised, the property belongs to all the objects of the power in equal shares.

Implied gift to objects of power in default of appointment.

Illustration.

A, by his will, bequeaths a fund to his wife, for her life, and directs that at her death it shall be divided among his children in such proportions as she shall appoint. The widow dies without having made any appointment. The fund will be divided equally among the children.

(This is sec. 79 of the Succession Act X of 1865. The words "shall appoint" is changed into "may appoint.")

COMMENTARY.

Execution of Power of Appointment.—When a person is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property. (Sec. 69).

Definition of "Power of Appointment."

Powers are of two kinds, General and Special. A power is said to be general when property is bequeathed to A in trust for any person or persons and in such shares and proportions as A shall by any deed or will appoint, and in default of appointment to B.

Here although A is not the beneficial owner of the property, yet he has the power at any time to dispose of the property as he likes and he may appoint the property to himself. Such a power of appointment is of great value and is nearly as good as ownership of the property, and the donee takes the property absolutely, *Gregory v. Samuel*, 21 C. W. N. 992. Similarly if the donee is given a life interest coupled with a general power of appointment by deed or will the donee may by executing a deed in his favour convert the life interest into an absolute interest, *Bapuji v. Haji Email*, 46 Bom. 694.

General Power.

A power is said to be special or limited when property is bequeathed to A in trust for such child or children of B and in such share or shares as A shall, by any deed or will, appoint and in default of appointment to all the children of B in equal shares. Here Special Power. although the property is at the disposal of A still he cannot convert it in any way to his own use; he has merely a power of disposition over it.

A power of appointment implies three persons:—(1) The creator or donor of the power; (2) the donee or appointer of the power, *i. e.*, the person to whom the power is given and (3) the appointee, *i. e.*, the person in whose favour the power is to be exercised.

Sec. 91 is confined to the execution of general powers and it states that a general bequest of the property of the testator shall be deemed to include the property over which the testator has a general power of appointment and shall operate as an execution of the power unless there is a contrary intention. In other words, if the testator has a general power of appointment over a certain property either by deed or by will and he fails to execute the power, but dies leaving a will containing a general residuary clause or a clause bequeathing all his estate and effects to a particular person, the property over which the testator had the power of appointment will pass under such a bequest or under the residuary clause as the case may be, *Spooner's Trust*, 2 Sim. N. S. 129; *Attorney-General v. Brackenbury*, 1 H. & C. 782. Before the passing of the Wills Act of 1837 in England a general devise of the property by a testator was no execution of his power of appointment, but operated only on the property that was the testator's own. In order to effectually execute the power of appointment the testator was required to refer to the property over which he had the power of appointment. Sec. 27 of the Wills Act in England and sec. 91 of this Act in India provide a remedy for that. It is also immaterial whether the will containing a general bequest is of a date prior or subsequent to the instrument creating the power, *Bayes v. Cook*, 14 C. D. 53; *Dinshaw v. Dinshaw*, 31 Bom. 473.

Sec. 92 is confined to special or limited powers of appointment. These are powers in the nature of trusts. If the testator has a special power of appointment over a certain property, that is to say, if the property is bequeathed to the testator in trust or with a direction that it shall be divided among his children in such proportions as he likes and there is no provision in the event of no appointment being made, if the power is not exercised, the property belongs to all his children, *i. e.*, the objects of the power, in equal shares. In order to have this effect the instrument creating the power must show an intention to create a trust in favour of the class to whom the property is directed to be appointed.

A general power differs from a special power or a trust power in the following respects:—In the case of a general power there is no trust reposed and if the power is not exercised sec. 91 will come into operation; but in a trust power if the power is not exercised equity in order to carry out the trust will interfere and distribute the property amongst all the objects of the power in equal shares and the class will take *per capita* as tenants in common, *Wilson v. Douglas*, 24 Ch. D. 244. There is also another distinction between a general power and a special power and it is this—that if there is a gift over in default of execution of

a general power the gift over will take effect if the power is not exercised but in case of a special power the gift over is always implied whether it is expressly mentioned or not. Even if the power to appoint is invalid the gift over in default will be given effect to so as not to disappoint the appointees, *Byramji v. Ratnagar*, 18 Bom. 1. No such implication will arise in case of mere power, *Re Weeke's Settlement*, 1897, 1 Ch. 289.

In the case of a special power if the power is exercised the court will not interfere and control the discretion or prescribe a mode of exercising it. The court will only interfere if the power is not exercised. Until the donee of the power exercises the same, the rule is that the property vests in all the members of the class and they will take in default of appointment, *Lambert v. Thwaites*, L. R. 2 Eq. 151, e. g. if a property is given to the children of A as B shall appoint, the property vests in all the children of A at the death of the testator and those children alone of A only will take in default of appointment to the exclusion of any after born child of A, *Coleman v. Seymour*, 1 Ves. Sen. 209. But if a life interest intervenes the children born during the life of the life-tenant will be included, *Crone v. Odell*, 1 Ball & Beat. 449.

• Examples.

(1) A devises his property situate at X to B in trust for such person or persons as B shall by his last will and testament appoint. B fails to execute the power, but dies leaving a will bequeathing the rest and residue of his property to P. P shall be entitled to the property at X. (This is an illustration of sec. 91).

(2) A testator appointed his wife executrix with full power of management and gave her a life interest and empowered her "duly as I have directed her orally and according to the terms to make her will." Held, that the words conferred on the widow a general power of appointment and not a power exercisable according to oral directions, *Shirinbai v. Ratanbai*, 45 Bom. 711 (P. C.), 48 I. A. 69.

(3) In 1883 N executed a settlement whereby he conveyed certain property to trustees on trust for himself for life and after his death in trust for such person or persons or charity or charities as N should by deed or writing or by will appoint. In 1885, previous to the settlement, N executed his last will and gave the residue of his property to A. N died in 1897 without making any express appointment of his said property under the settlement and without leaving any other will. It was held that the power was validly exercised by N by his will of 1885 which was executed previous to the instrument creating the power and that A was entitled to the property, *Dinshaw v. Dinshaw*, 31 Bom. 472, with facts slightly altered. (This is an illustration of sec. 91).

(4) A, by his will, bequeaths a fund to his wife for life, and directs that at her death, it shall be divided among his children in such proportions as she shall appoint. The widow dies without having made any appointment. The fund shall be divided equally among the children. (This is an illustration of sec. 92).

(5) A certain property was settled on A and B for their joint lives, and on the death of the survivor, among all and every the children of A, in such shares as A might by will appoint. A had seven children at the date of the settlement, one of whom died before A who died without executing the power of appointment. It was held that the property should be divided into seven shares, one of which was to go to the representatives of the deceased child, *Lambert v. Thwaites*, L. R., 2 Eq. 155.

NOTE.—In the case of a special power, if the instrument gives the property to a class but gives power to A to appoint in what shares and in what manner he likes, the property

vests until the power is exercised in *all* the members of the class and they will take in default of appointment including any member of the class who shall have predeceased the donee of the power. But a direct gift without the intervention of a life interest to the children as A may appoint goes apparently to all the children living at the death of the testator to the exclusion of those born afterward, though before the death of A, *Coleman v. Seymour*, 1 Ves. Sen. 209.

(6) A property is settled on A for life with remainder to the children of A as he shall appoint. At the date of the settlement A had three children. At the date of his death he had five children. A failed to exercise the power. The property shall be divided amongst the five children of A in equal shares, *Crone v. Odell*, 1 Ball and Beat. 449.

(7) A testator disposed of his property as follows :—" To my son A two shares—only interest. To my daughter B and C one share each—only interest. Shares shall not be transferable during their life time. At the demise of my children without issue shares to be divided in the above proportions to the survivors. In the event of issue they to have power to bequeath their share to any one of their children they may select". O married and by marriage settlement her share was settled on certain trusts. C and her husband subsequently made a joint will constituting the survivor sole heir. C died leaving one child. C's husband and trustees filed a suit for construction. *Held* that the settlement was void, that the power of appointment given to C was not exercised properly by joint will and that the child of C was entitled to her share, *Fehrson v. Simpson*, 4 Cal. 514.

Hindu Law and Power of Appointment.—As the power of appointment is purely a creature of English law these sections are not applied to Hindus. But the Hindu Law also recognises such powers with certain limitations. These limitations are:—(1) that the appointee should be a person who was alive at the death of the testator, (*Tagore v. Tagore*, 9 B. L. R. 377) and (2) that the appointee must be ascertained when the event arises on which he is to take. No valid appointment can be made in favour of an idol not in existence at the testator's death, *Upendra v. Hem Chundra*, 25 Cal. 405; *Javerbai v. Kablibai*, 16 Bom. 492; *Motivahu v. Mamubai*, 21 Bom. 709, 24 I. A. 93; *Manorama v. Kali Charan*, 31 Cal. 166; *Bhagabati v. Kali Charan*, 38 Cal. 468 (P. C.); *Mahim Chandra v. Hara Kumari*, 42 Cal. 561; *Adv.-General v. Vithaldas*, 22 Bom. L. R. 1005.

93. Where a bequest is made to the "heirs" or "right heirs" or "relations" or "nearest relations" or "family" or "kindred" or "nearest of kin" or "next-of-kin" of a particular person without any qualifying terms, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person and he had died intestate in respect of it, leaving assets for the payment of his debts independently of such property.

Illustrations.

(i) A leaves his property "to my own nearest relations." The property goes to those who would be entitled to it if A had died intestate, leaving assets for the payment of his debts independently of such property.

(ii) A bequeaths 10,000 rupees "to B for his life, and, after the death of B to my own right heirs." The legacy after B's death belongs to those who would be entitled to it if it had formed part of A's unbequeathed property.

(iii) A leaves his property to B; but if B dies before him, to B's next-of-kin; B dies before A, the property devolves as if it had belonged to B, and he had died intestate, leaving assets for the payment of his debts independently of such property.

(iv) A leaves 10,000 rupees "to B for his life, and after his decease to the heirs of C." The legacy goes as if it had belonged to C, and he had died intestate, leaving assets for the payment of his debts independently of the legacy.

(This is sec. 80 of the Succession Act X of 1865).

COMMENTARY.

Sections 93 to 100 are confined to general descriptive terms used ordinarily in connection with legatees. The words "without any qualifying terms" refer to bequest and not to relations, etc., *Pestonji v. Khurshedbai*, 7 Bom. L. R. 207. The following rules of construction are laid down by these sections.

Rule 1.—A bequest to "heirs" or "right heirs," "relations" or "nearest relations," "family" or to "kindred," "nearest of kin" or "next-of-kin" without any qualifying words will include the next-of-kin of the testator or of the person as if he had died intestate.

Shelley's Case.—One of the rules in this case is that if an estate is vested in trustees in trust for A for life with remainder in trust for the heirs of A, then A takes an estate in tail. This section is a departure from this rule. Here, if a property is given to A for life with remainder to the heirs of A the property will after A's death belong to the next-of-kin of A, in accordance with the rules of intestate succession (see ill. iv). The rule in *Shelley's case* was not applied to Parsis in *Mithibai v. Limji N. Banaji*, 5 Bom. 506, in appeal 6 Bom. 151. It was also not applied to Portuguese, *Antao v. Ardesbir*, 1 Bom. L. R. 303.

Heir.—The word would include all the next-of-kin of the deceased unless any is expressly excluded. In *Dinbai v. Nusserwanji*, 49 I. A. 323, a Parsi by his will provided that after the death of his widow his property be held in trust for his son J for life and on J's death to his widow and children. If J died without issue Rs. 10,000 to be paid to J's widow and to divide the residue "among my heirs" according to the law of intestate succession among Parsis excluding the widow of J from getting any share in such distribution. J died without issue leaving widow who claimed the residue. It was held she was excluded.

Relations.—When a legacy is given by a testator to "my relations" or "to my nearest relations," or "my most necessitous or poorest relations" the legacy will be distributed amongst the persons who would be entitled under the order of succession, if the person bequeathing the legacy had died intestate, *Whithorne v. Harris*, 2 Ves. Sen. 527; *Widmore v. Woodroffe*, Ambl. 636. The word "next-of-kin" must also be construed in the same sense. In England a distinction is taken between those who are related by blood and those who are related by marriage, and, if a bequest is made to the next-of-kin *simpliciter*, the bequest is to the nearest in blood to the *propositus* and will exclude the husband or wife, *Halton v. Foster*, L. R. 3 Chan. App. 505; *Cholmondeley v. Lord Ashburton*, 6 Beav. 86. Under sec. 93 a bequest to the next-of-kin of a particular person shall be distributed as if that person had died intestate.

As there is no distinction under the Act between those who are related by blood and those related by full blood under the expressions "relations," or "next of kin," etc., persons related by half blood shall be entitled to succeed equally those related by full blood.

Next-of-kin.—Under the term "next-of-kin" will succeed all those who are kindred to the person whose next-of-kin are spoken of at the time of his death. And this construction ought to be applied whether the will speaks of the testator's own next-of-kin or the next-of-kin of some other person, unless there is a contrary intention in the will, and the rule is not varied by the circumstance that the bequest to the next-of-kin is preceded by a bequest of the fund to a tenant for life or that the bequest is contingent on an event which may or may not happen, *Bird v. Luckie*, 8 Hare, 301.

Where the tenant for life is himself one of the next-of-kin, it was at one time thought that the next-of-kin intended to take must be the next-of-kin living at the death of the tenant for life. But the law is now settled, that if there is nothing in the context of the will to control the natural meaning of the testator's words, the next-of-kin living at his death will be entitled; and that if the tenant for life happens to be one of such next-of-kin, or to be solely such next-of-kin he is not to that account to be excluded, *Holloway v. Holloway*, 5 Ves. 399. (Willis & Gower, 10th Edn. pp. 884-886).

Family.—The word "family" is also construed according to English law in various senses, such as kindred, or relations, or in its primary meaning as confined only to the exclusion even of the wife, *Re Hutchinson and Tenant*, 8 C. 10. According to sec. 93, however, a bequest to family *simpliciter* is a bequest to persons who would be entitled in case of intestacy. In *Khetter Mohan v. Narain*, 4 C. W. N. 671, the word family was held to mean the testator's descendants and their wives living at the time of his death; see also *Gnanendra v. Sur*, 24 C. W. N. 1026 (P. C.); see also *Doe d' M'Kenzie v. Pestonji, Perry*, O. C.

94. Where a bequest is made to the "representative legal representatives" or "personal representatives" or "executors or administrators" of a particular person, and the class so designated is the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person and he had died intestate in respect of it.

Illustration.

A bequest is made to the "legal representatives" of A. A has died intestate insolvent. B is his administrator. B is entitled to receive the legacy, and will apply the first place to the discharge of such part of A's debts as may remain unpaid; if there is any surplus, B will pay it to those persons who at A's death would have been entitled to receive any property of A's which might remain after payment of his debts, or the legal representatives of such persons.

(This is sec. 81 of the Succession Act X of 1885).

COMMENTARY.

Rule II,—where a bequest is made simply to the (1) Representatives, (2) Legal Representatives, (3) Personal Representatives, (4) Executors or Administrators of a particular person, the property bequeathed shall be distributed as if it had belonged to such person, and he had died *intestate* in respect of it.

The difference between rule I under sec. 93 and rule II in this section is that in case of a bequest to heirs, relations, family, etc., under sec. 93, the person takes the bequest *beneficially*, whereas in the case of a bequest to representatives, executors, etc., of a particular person *simpliciter* under sec. 94, the representatives, etc., do not take it beneficially but hold it *as part of the estate which they represent* and for the purposes, whatever they may be, for which they hold the general estate of the person whose representatives they are, *Mackenzie v. Mackenzie*, 3 Mac. and G. 599; *Long v. Watkinson*, 17 Beav. 471; *Lord Advocate v. Bogie*, (1894) A. C. 83. (See ill. to sec. 94).

The words "representatives" or "legal representatives" are sometimes construed as next-of-kin and in that case they will take the estate beneficially for themselves. The context may show that by representatives are meant next-of-kin, *e. g.*, where the gift is to them "equally," or "share and share alike," *King v. Cleveland*, 4 De G. & J. 477; *Re Grylls' Trusts*, L. R. 6 Eq. 589.

95. Where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him.

Bequest without words of limitation.

(This is sec 82 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

In England before the Wills Act a devise of real estate without any words of limitation was held to pass an estate for life only and in order that a devise in fee should pass, the technical words "heirs and assigns" were required to be added. This worked a great hardship and section 28 of the English Wills Act remedied this hardship. That section provides that "Where any real estate shall be devised to any person without any words of limitation such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will" (1 Vict. C. 26, sec. 28). Sec. 95 is enacted on the same principle and no technical words are required to be added in order to transfer the whole interest of the testator. As to whether a particular clause or a particular expression conveys the whole interest or a limited interest is in each case a question of construction; but an unqualified gift will not be cut down by subsequent words, *Tripurari v. Jaqat Tarini*, 40 I. A. 37. This section only enacts that technical words are not necessary, and hence a gift whether of moveable or of immoveable property without express words of inheritance or without express power of alienation will carry an estate of inheritance in the absence of any contrary intention, *Lala Ramjewan v. Dul Koer*, 24 Cal. 406; *Curalapathi v. Cota*, 33 Mad. 91.

Gift to Hindu Widows.—In construing wills of Hindus whether governed by the Hindu Wills Act or otherwise under this head the general rules laid down in the Privy Council decisions stated in the beginning of this chapter must be borne in mind. A Hindu generally desires that an estate, specially an ancestral estate, shall be retained in his family and also that as a general rule women do not take absolute interest of inheritance which they are enabled to alienate, e.g., a mere gift of immoveable property by a Hindu to his wife does not carry with it the power of alienation, *Harilal v. Bai Rewa*, 21 Bom. 376. In *Ramchandra v. Vijayaragavulu*, 31 Mad. 349, it was however held that an absolute gift of immoveable property to a widow for maintenance was not unknown to Hindu Law; *Saroda v. Kristo*, 5 C. W. N. 300; *Mahomed v. Shewukram*, 2 I. A. 7; *F. Yorke Smith v. Tribhovandas*, 19 Bom. 401, *Motivahoo v. Mamubai*, 24 I. A. 93; *Mahim Chandra v. Hara Kumari*, 42 Cal. 561. If the husband wishes that an absolute power of alienation should be given to his wife he must give it in express terms, *Seshayya v. Narasamma*, 22 Mad. 357. Whether this rule of Hindu Law is modified by sec. 95 which applies to Hindus formerly governed by the Hindu Wills Act, see *Pulliah Chetti v. Varadarajulu*, 31 Mad. 474, where it was held that a gift of immoveable property *simpliciter* to his wife will convey absolute interest. However, in the case of *Caralapathi v. Cota*, 33 Mad. 91, it was held that the operation of the ordinary rule of Hindu Law that a bequest to a wife without words creating an absolute estate conferred only a limited interest was excluded by sec. 95. See also *Bhoba Tarini v. Peary Lall*, 24 Cal. 646; also *Hirabai v. Lakshmi Bai*, 11 Bom. 573, where it was held that a widow taking under her husband's will takes only a widow's estate unless the will contains express words giving her a larger estate. See *Pulliah Chetti v. Varadarajulu*, 31 Mad. 474; *Damodardas v. Dayabhai*, 22 Bom. 833. In *Pulliah Chetti v. Varadarajulu*, 31 Mad. 474 it was held that where a Hindu husband bequeaths his property *simpliciter* to his wife, the wife will take the whole interest of the husband in the property and not a mere life interest, unless it appears from the contents of the will that only a restricted interest was intended for her. See also *Abdul Karim v. Abdul Qayum*, 28 All. 342. But the Bombay High Court in *Ambalal v. Bai Rewa*, 5 Bom. L. R. 334 held that in order to create an absolute interest in favour of his wife, it would be necessary for the husband to use express language to that effect, *Koonjebhari v. Premchand*, 5 Cal. 684. In *Mulchand v. Rukshmani*, 25 Bom. L. R. 189, a testator bequeathed his property to his wife in the following words: "After my death my wife is to take my property into her possession with authority to consume, enjoy or do what she likes..... After the death of my wife my son is the owner of my estate." Held that the widow did not take an absolute estate. If, on the other hand, a husband while making a disposition in favour of his wife uses words conferring absolute ownership she would enjoy all the rights of an owner including the power of alienation, see *Bhaidas v. Bai Gulab*, 46 Bom. 153 (P. C.); see also *Ramachandra v. Ramachandra*, 42 Mad. 283.

It is extremely difficult to lay down any rule for determining whether a life interest or an absolute interest is intended. But in the absence of any thing to the contrary in the case of a bequest to a Hindu widow the presumption is in favour of a life interest. *See v.*

Life interest to widow coupled with power of alienation.—The cases on this subject divide into two parts (1) where power of alienation is given

absolutely and (2) power of alienation in case of necessity. In the first group the widow will take the property absolutely, see *Jogeswar v. Ram Chandra*, 23 Cal. 670 (P. C.); *Mahim Chandra v. Hara Kumari*, 42 Cal. 561. In the second group the widow will only take a life interest with the right to alienate under the circumstances specified, *Mulchand v. Bai Rukshmani*, 25 Bom. L. R. 189; *Jamna Das v. Ramautar*, 27 All 364; see also *Natha Kerra v. Dhunhaiji*, 23 Bom. 1.

As to meaning of the words "Malik" and "Poutra Poutradi" used in connection with the gift to Hindu widows, see p. 73 ante.

Gift to other male and Female Heirs.—In respect of other female heirs, e. g., daughters etc., the rule is not so strict and in *Jogeswar v. Ram Chund*, 23 I. A. 37, a gift to a daughter of four anna share "for your maintenance" was held to be an absolute gift, and in *Kamarazu v. Venkataratnam*, 20 Mad. 293 a bequest to the two daughters to be enjoyed by them "as they pleased" was held to confer absolute interest. See also *Siva Rau v. Vitla*, 21 Mad. 425.

Even where some terms of a will apparently give an absolute interest but subsequent provisions show that only a life interest was intended, effect will be given to that intention by cutting down the effect of the former words and construing them as conferring a life estate only, *Vullubhdas v. Thucker Gordhandas*, 14 Bom. 361; *Somasundara v. Ganga*, 28 Mad. 386. But if the gift is unqualified, specially if the gift is to a male Hindu, it will not be cut down by subsequent words unless the words have that effect, *Damoderdas Tapidas v. Dayabhai Tapidas*, 25 I. A. 126, 22 Bom. 833; *Tripurari v. Jagat Tarini*, 40 I. A. 37; *Gulbaji v. Rustomji*, 27 Bom. L. R. 380.

96. Where property is bequeathed to a person with a bequest in the alternative to another person or to a class of persons, then, if a contrary intention does not appear by the will, the legatee first named shall be entitled to the legacy if he is alive at the time when it takes effect; but if he is then dead, the person or class of persons named in the second branch of the alternative shall take the legacy.

Bequest in alternative.

Illustrations.

- (i) A bequest is made to A or to B. A survives the testator. B takes nothing.
- (ii) A bequest is made to A or to B. A dies after the date of the will, and before the testator. The legacy goes to B.
- (iii) A bequest is made to A or to B. A is dead at the date of the will. The legacy goes to B.
- (iv) Property is bequeathed to A or his heirs. A survives the testator. A takes the property absolutely.
- (v) Property is bequeathed to A or his nearest of kin. A dies in the lifetime of the testator. Upon the death of the testator, the bequest to A's nearest of kin takes effect.
- (vi) Property is bequeathed to A for life, and after his death to B or his heirs. A and B survive the testator. B dies in A's lifetime. Upon A's death the bequest to the heirs of B takes effect.

(vi) Property is bequeathed to A for life, and after his death to B or his heirs. B dies in the testator's lifetime. A survives the testator. Upon A's death the bequest to the heirs of B takes effect.

(This is sec. 83 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 67, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Substitutional gifts or gifts in the alternative.—The simplest form of a substitutional or alternative gift is introduced by the word "or," e. g., a bequest to A or to B. In such a case the rule is that if a contrary intention is not expressed in the will, the first legatee, viz., A, will take the legacy if he is alive when the testator dies, but if he be then dead the legacy will go to B. The substituted gift takes effect if the original legatee dies before the testator or even if he be dead at the date of the will, see illustration (ii) & (iii). Thus a direct gift to "A or his children" or "to A or his issue" goes to A if he survives the testator, and to his children or issue if he does not. Similarly, if there is a life interest and then a gift "to A or his children" the substitutional gift takes effect whether A dies in the lifetime of the testator or the tenant for life. (Ills. vi., and vii.). But a gift to A or B, or to A or his children, as C may appoint is not substitutional, and in default of appointment it goes among all the appointees equally, *Penny v. Turner*, 2 Ph. 493.

Again, if a bequest is made "to A or his heirs," or "to A or his next-of-kin," or "to A or his representatives," and A dies in the lifetime of the testator, the legacy does not lapse but goes to the heirs or the next-of-kin or the representatives of A as the case may be. (Ill. v.). In such cases, generally speaking, the word "or" implies a substitution so as to prevent a lapse, *Gittings v. M'Dermott*, 2 My. and K. 69.

This section only applies if the original gift is to an individual and not to a class. The substitutionary gift may be to an individual or to a class.

Where the gift is to a class of persons with a substitutional gift to the children of any member of the class dying before the period of distribution, such children will take if their parent die after the date of the will and before the testator. The rule was laid down in *Christopherson v. Naylor*, 1 Mer. 320 that where there is a gift to a class,

his parent might have been one of the original class, and consequently, if the

The rule in *Christopherson v. Naylor* was not followed in *In Re Williams, Metcalf v. Williams*, (1914) 1 Ch. 219 affirmed (1914) 2 Ch. 61 in which case the grand children of the son of the testator who had died before the making of the will were held to come under a gift to a class. The rule has been made subject to the rule laid down in *Re Potter's Trust*, L. R. 8 Eq. 52, viz., that, where there is a gift to a class of persons, with substitution to their issue in case of their dying, that means, whether they are dead when the will is made or die afterwards, the substituted class takes in each case, (Williams on Executors, 10th Edn., pp. 959-961).

If the gift is to "my children *then* living and the children of such of my *said* children as shall be *then* dead," the testator by using the word "*said*" children shows that he is contemplating a class of children living at the date of the will and capable of taking under it, and therefore children of those dead at the date of the will will not be admitted, *Re Thompson's Trust*, 2 W. R. 218. But if there is anything to assist the construction, issue of members of the class dead at the date of the will may be let in. Thus, if none of the members of the original class are alive at the date of the will, or if the original class is brothers and sisters and the testator has only one brother living at the date of the will, children of those then dead will come in, *Gowling v. Thompson*, 11 Eq. 366; *Re Jordan's Trust*, 2 N. R. 57; *Jarvis v. Pound*, 9 Sim. 549. It is obviously difficult to lay down any general rule as to what words shall and what words shall not render a gift substitutional in these cases.

97. Where property is bequeathed to a person, and words

Effect of words describing a class added to bequest to person.

are added which describe a class of persons but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a

contrary intention appears by the will.

Illustrations

(i) A bequest is made—

- to A and his children,
- to A and his children by his present wife,
- to A and his heirs,
- to A and the heirs of his body,
- to A and the heirs male of his body,
- to A and the heirs female of his body,
- to A and his issue,
- to A and his family,
- to A and his descendants,
- to A and his representatives,
- to A and his personal representatives,
- to A, his executors and administrators.

In each of these cases, A takes the whole interest which the testator had in the property.

(ii) A bequest is made to A and his brothers. A and his brothers are jointly entitled to the legacy.

(iii) A bequest is made to A for life and after his death to his issue. At the death of A the property belongs in equal shares to all persons who then answer the description of issue of A.

(This is sec. 84 of the Succession Act X of 1865).

COMMENTARY.

Bequest with Words of Limitation.—Under sec. 95 if a bequest is made to a person *simpliciter* he takes the property absolutely. Under this section even if words of limitation are added the person will take the property absolutely—the difference.

between the two sections being that sec. 95 confers absolute interest without words of limitation; under this section the same effect is produced with the words of limitation.

Distinction between "words of Limitation" and "words of Purchase."—If a bequest is made to "A and his heirs" the legatee intended is A and not the heirs—the word "heirs" merely points out the extent of interest given to A. A takes the property under the instrument and the heirs by descent. The word "heirs" is termed a "word of limitation." If on the other hand by the word "heirs" the testator indicates a particular person or persons who are intended to take as *personæ designatæ* it becomes a "word of purchase" and means the person or persons who would succeed to the estate of the person named if he died intestate (see ill. iii.). The estate given to A is defined completely and the issue are noted as a distinct class. In the illustration (1) A takes an absolute interest, the additional words being merely words of limitation. So, too, a gift to A for life and then to his executors or administrators gives A the absolute interest, *Avern v. Lloyd*, 5 Eq. 383.

But a bequest to A for life, and after his death to his issue does not give A an absolute interest. Here the word "issue" denotes direct objects of a distinct and independent gift. A, therefore, merely takes a life interest and the bequest belongs in equal shares to all who answer the description of issue of A (Ill. iii.). The rule is that wherever there is any evidence, that the testator did not use the words "issue," "children," etc., as words of limitation, but intended that both the parent and the children or issue should take, effect will be given to that intention and they will either take concurrently with the parent, or as purchasers after the parent's death or by substitution, e. g., where the issue are to take *per stirpes*, *Clay v. Pennington*, 7 Sim. 370; *Law v. Thorp*, 27 L. J. Ch. 649; *Re Stanhope's Trusts*, 27 Beav. 201. A gift to the heirs of A, from generation to generation confers upon them when ascertained exactly the same estate as if the gift was to X & Y the heirs of A nominatim, *Fardunji M. Banaji v. Mithibai*, 22 Bom. 355. In *Rajah Chundernath v. Kooar Gobindnath*, 11 B. L. R. 86 their Lordships of the Privy Council said:—"The words from generation to generation may in some cases mean no more than to express the absolute character of the gift." See also *Arumugam v. Ammi Ammal*, 1 M. H. C. R. 400 where it was held that the words "generation to generation" did not import more than "absolutely" and "for ever" under English instruments. In *Muhammad v. Fatima*, 8 All. 39 (P. C.), their Lordships held that the word "always" and "for ever" will not invariably convey a full interest. In *Aziz-un-Nissa v. Tasaddug*, 3 Bom. L. R. 307 (P. C.), it was held that the word "Hamesha" (always and for ever) does not *per se* extend the interest beyond the life of the person named.

In *Bhoobun Mohini v. Hurriah Chunder*, 5 I. A. 138, the gift was "Do you and the generations (children and grand children) born of your womb successively enjoy the same. No other heirs of yours shall have right or interest." It was held that the donee took the property absolutely. In *Richard Skinner v. Kunwar Naunihal*, 17 C. W. N. 853 (P. C.), the bequest was to the testator's eldest son Thomas "and to his lawful male children according to the law of inheritance" and in the event of Thomas dying without lawful male children to the testator's next male heir and in default to the female children. It was held that Thomas took a life interest. In *Dadabhoy v. Cowasji*, 47 Bom. 349, a Parsi lady settled her property to her for life, then for her son for life and then for "his sons and their male heirs" absolutely

in equal shares as tenants in common. It was held that the words "male heirs" did not import any limitation and that the grandsons took the property absolutely as tenants in common. In *Benode Behari v. Nistarini*, 33 Cal. 180 (P. C.), a Hindu testator gave the residue of his estate to his widow for life and after her death he directed his executors to give the same to such persons "who shall be his heirs." It was held that if the word "heirs" meant the persons who would be heirs at the widow's death the gift was void and the event was an intestacy. If on the other hand the word "heirs" meant the testator's right heirs that was the widow herself.

Bequest to class of persons under general description only.

98. Where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not in their ordinary sense applicable shall take the legacy.

(This is sec. 85 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Sections 98, 111, 115, and 121 are to be read together. Sec. 98 lays down a general descriptive rule, viz., that if a bequest is to a class only those take whom the description applies. Sections 111 and 121 lay down rules for ascertaining of the class; sec. 115 lays down the limit within which a gift to a class can be made.

Definition of Class.—A number of persons are popularly said to form a class when they can be designated by some general name as "children," "grand children" "nephews," etc.; but in legal language the question whether a gift is one to a class depends not upon these considerations but upon the mode of gift itself, viz., that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift to be ascertained at a future time and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons, *Krishnanath v. Atmaram*, 15 Bom. 543.

A gift to a class is a gift to persons who are included and comprehended under some general description and bear a certain relation to the testator or to a specified individual, e. g., a bequest to my nephews and nieces, or a bequest to the children of B. It may be none the less a class though some of the individuals are named, e. g., a gift is made "to all my nephews and nieces including A." In *Re Stanhope's Trust*, 27 Beav. 201 there was a gift to four named daughters and all his after-born daughters, and that was held to be a class-gift. But in order to constitute a named person a member of a class, he must have a common character with the unnamed members of the class, e. g., a bequest to A for life and at his death "to be equally divided amongst his surviving children and my niece R" is not a gift to a class as R has not a common character with the other members of the class, *Drakeford v. Drakeford*, 33 Beav. 43. A gift to "the five daughters" of A or "to my nine children" is not a gift to a class, *In re Smith's Trusts*, 9 Ch. D. 117; *In re Stansfield*, 15 Ch. D. 84. Also a bequest "to my grand children by my late daughter E and to my nephew F and step brother G equally" is not a gift to a class, but to them individually as *personæ designatæ*, *Adm.-General v. Money*, 15 Mad. 448. Also a gift "to my daughters S, K, & B" is not a gift to a class, *Sallay Mahomed v. Lady Janbai*, 3 Bom. L. R. 785. See also *In re Harper, Plowman v. Harper*, (1914) 1 Ch. 70.

"A gift to a class implies an intention to benefit those who constitute the class and to exclude all others; but a gift to individuals described by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named. In a gift to a class you look to the description and inquire what individuals answer to it; and those who do answer to it are the legatees described. But if the parties to whom the legacy is given be not described as a class, but by their individual names and additions, though together constituting a class, those who may constitute a class at any particular time may not, in any respect, correspond with the description of the individuals named as legatees. If a testator give a legacy to be divided amongst the children of A at a particular time, those who constitute the class at the time will take; but if the legacy be given to B, C, and D, children of A, as tenants in common and one die before the testator, the survivors will not take the share of the deceased child." Lord Cottenham in *Barber v. Barber*, 3 My. & Cr. 688; (Williams on Executors, 10th Edn., pp. 1213, 1214, see also *Salla Mahomed v. Dame Janbai*, 22 Bom. 17, 24 I. A. 148; *Pestonji v. Khurshedbai*, 7 Bom. L. R. 207). On the other hand where the legacy is given to a class of persons in general terms as tenants in common, *e.g.*, to the children of A and one of the children dies before the testator, those who survive the testator will take the whole. (See *Viner v. Francis*, 2 Cox. 190 and other cases cited in Williams on Executors, 10th Ed. p. 963 *et seq.* See also *Kingsbury v. Walter*, (1901) A. C. 187, where all the previous cases are discussed). Hence a bequest to a class is distinguished from a bequest to individuals in following respects:—

(1) In a gift to a class, on the death of any member of the class, the gift survives to the surviving members or member. In case of a bequest to an individual or a number of individuals the bequest or the share of any who dies lapses.

(2) In a gift to a class the class must be ascertained at one and the same time, *i.e.*, all the interests of the members of the class must vest in interest at the same time, although the class may be capable of enlargement, *Kingsbury v. Walter*, (1901) A. C. 187. In case of a bequest to individuals it is not so. As for example, a gift to the daughters of A and the daughters of B is a gift to a class, because the class is ascertained at one and the same time, *viz.*, the death of the testator, *Re Stanhope's Trusts*, 27 Beav. 201; *In re Jackson*, 25 Ch. D. 162. Also a gift to A for life and afterwards to the children of C is a gift to a class, although it is capable of enlargement by the birth of subsequent children of C during the lifetime of the tenant for life.

(For exception to this rule see sec. 121).

Examples.

(1) A gift by a testator to his five named daughters and all his other sons and daughters who should be born afterwards and attain majority is a gift to a class, *In re Jackson*, 25 C. D. 162.

(2) A gift to "my executors hereinafter named to enable them to pay my debts, legacies, funeral and testamentary charges, and also to recompense them for their trouble equally between them," and one of the executors named in the will predeceased the testator, it was held that the gift was to the executors as a class and the legacy survived to the two executors, *Knigh v. Gould*, 2 M. & K. 295.

(3) A bequest is made "to the children of A begotten or to be begotten." All the children of A in existence (including any child *en ventre en mere*) at the death of the testator will be entitled to the bequest to the exclusion of any child or children of A who may be born after the testator's death, *Viner v. Francis*, 2 Cox, 190; *Roberts v. Higman*, 1 Bro. C. C. 532; *Pudmanund v. Hayes*, 3 Bom. L. R. 803 (P. C.).

(4) B by his will directed as follows:—"My son-in-law N. with his wife S. and children to live in the house for ever." *Held*. It is not a gift to a class, *Krishnanath v. Atmaram*, 15 Bom. 543.

Bequest "to the children of A and B."—For the construction of this term the following rules have been laid down in Theobald on Wills, 7th Edn., p. 293:—

(a) The *prima facie* grammatical construction of a gift to the children of A and B is that B and the children of A are entitled, *In re Featherstone's Trusts*, 22 Ch. D. 111.

(b) If A and B are described as bearing the same relation to the testator, and equal legacies have been given to them, the children of both take—as in a gift to the children of my brother A and my brother B, *Mason v. Baker*, 2 K. & J. 567.

(c) If they do not bear the same relation to the testator, and A has children at the date of the will, while B is unmarried the gift goes to B and the children of A, *Stummvoll v. Hales*, 34 Beav. 124.

(d) So, too, if A is described as deceased; for instance, if the gift be to the children of the late A and B, B and the children of A will take, *Lugar v. Harman*, 1 Cox. 250.

(e) A gift for "the benefit of the children of A and of B" goes to the children of A and of B, *Peacock v. Stockford*, 3 De G. M. & G. 73.

(f) According to Hindu Law a bequest to the children of A living at his decease where some children are in existence at the date of the will is not a gift to a class of which some members might come into existence after the testator's death, *Krishnarao v. Benabai*, 20 Bom. 571.

Hindus.—Secs. 98, 111, 115, 121 are made applicable to Hindus under the Hindu Wills Act. But in dealing with the wills of Hindus it must be remembered that by Hindu Law a gift to persons unborn at the time of the death of the testator is void, *Tagore v. Tagore*, 9 B. L. R. 377, 1 A. Sup. Vol. 47; *Mamubai v. Dossa Morarji*, 15 Bom. 443; *Richard Skinner v. Durga Persad*, 31 All. 239. Accordingly, where there is a gift to a class, some of whom are or may be incapacitated from taking, because not born at the date of the death of the testator, the gift is held to enure for the benefit of those members of the class who are capable of taking, provided there is no other objection to the gift, *Dhanlaxmi v. Hariprasad*, 23 Bom. L. R. 433. See *Ram Lal v. Kanai Lal*, 12 Cal. 663.

In case of a bequest to persons who are all members of a joint Hindu family, it does not follow that they take such property as joint property, *Kishori v. Mundra*, 33 All. 665. See also *Bai Diwali v. Patel Becharadas*, 26 Bom. 445; *Gopi v. Musammatt Jaldhara*, 33 All. 41; *Ashutosh v. Doorga Churn*, 6 I. A. 182. In *Kherodemoney Dossee v. Doorgamoney Dossee*, 3 C. H. C. 315, the devise was to the son lately born to B and to the son or sons that may hereafter be born to him. It was held following, *Leake v. Robinson*, that the whole devise failed. Similarly in

“A gift to a class implies an intention to benefit those who constitute the class and to exclude all others; but a gift to individuals described by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named. In a gift to a class you look to the description and inquire what individuals answer to it; and those who do answer to it are the legatees described. But if the parties to whom the legacy is given be not described as a class, but by their individual names and additions, though together constituting a class, those who may constitute a class at any particular time may not, in any respect, correspond with the description of the individuals named as legatees. If a testator give a legacy to be divided amongst the children of A at a particular time, those who constitute the class at the time will take; but if the legacy be given to B, C, and D, children of A, as tenants in common and one die before the testator, the survivors will not take the share of the deceased child.” Lord Cottenham in *Barber v. Barber*, 3 My. & Cr. 688; (Williams on Executors, 10th Edn., pp. 1213, 1214, see also *Salla Mahomed v. Dame Janbai*, 22 Bom. 17, 24 I. A. 148; *Pestonji v. Khurshedbai*, 7 Bom. L. R. 207). On the other hand where the legacy is given to a class of persons in general terms as tenants in common, e.g., to the children of A and one of the children dies before the testator, those who survive the testator will take the whole. (See *Viner v. Francis*, 2 Cox. 190 and other cases cited in Williams on Executors, 10th Ed. p. 963 *et seq.* See also *Kingsbury v. Walter*, (1901) A. C. 187, where all the previous cases are discussed). Hence a bequest to a class is distinguished from a bequest to individuals in following respects :—

(1) In a gift to a class, on the death of any member of the class, the gift survives to the surviving members or member. In case of a bequest to an individual or a number of individuals the bequest or the share of any who dies lapses.

(2) In a gift to a class the class must be ascertained at one and the same time, i.e., all the interests of the members of the class must vest in interest at the same time, although the class may be capable of enlargement, *Kingsbury v. Walter*, (1901) A. C. 187. In case of a bequest to individuals it is not so. As for example, a gift to the daughters of A and the daughters of B is a gift to a class, because the class is ascertained at one and the same time, viz., the death of the testator, *Re Stanhope's Trusts*, 27 Beav. 201; *In re Jackson*, 25 Ch. D. 162. Also a gift to A for life and afterwards to the children of C is a gift to a class, although it is capable of enlargement by the birth of subsequent children of C during the lifetime of the tenant for life.

(For exception to this rule see sec. 121).

Examples.

(1) A gift by a testator to his five named daughters and all his other sons and daughters who should be born afterwards and attain majority is a gift to a class, *In re Jackson*, 25 C. D. 162.

(2) A gift to “my executors hereinafter named to enable them to pay my debts, legacies, funeral and testamentary charges, and also to recompense them for their trouble equally between them,” and one of the executors named in the will predeceased the testator, it was held that the gift was to the executors as a class and the legacy survived to the two executors, *Knight v. Gould*, 2 N. & K. 295.

(3) A bequest is made "to the children of A begotten or to be begotten." All the children of A in existence (including any child *en ventre sa mere*) at the death of the testator will be entitled to the bequest to the exclusion of any child or children of A who may be born after the testator's death, *Titer v. Francis*, 2 Cox, 190; *Roberts v. Higman*, 1 Bro. C. C. 532; *Pudmanund v. Hayes* 3 Bom. L. R. 803 (P. C.).

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(c) If they do not bear the same relation to the testator, and A has children at the date of the will, while B is unmarried the gift goes to B and the children of A, *Stummvoll v. Hales*, 34 Beav. 124.

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In case of a bequest to persons who are all members of a joint Hindu family, it does not follow that they take such property as joint property, *Kishori v. Mundra*, 33 All. 665. See also *Bai Diwali v. Patel Becharadas*, 26 Bom. 445; *Gopi v. Musammatt Jaldhara*, 33 All. 41; *Ashutosh v. Doorga Churn*, 6 I. A. 182. In *Kheradomoney Dossee v. Doorgamoney Dossee*, 3 C. H. C. 315, the devise was to the son lately born to B and to the son or sons that may hereafter be born to him. It was held following, *Leake v. Robinson*, that the whole devise failed. Similarly in

(v) A bequeaths a legacy to "the children of B." B never had any legitimate child. C and D had, at the date of the will, acquired the reputation of being children of B. After the date of the will and before the death of the testator, E and F were born, and acquired the reputation of being children of B. Only C and D are objects of the bequest.

(vi) A makes a bequest in favour of his child by a certain woman, not his wife. B had acquired at the date of the will the reputation of being the child of A by the woman designated. B takes the legacy.

(vii) A makes a bequest in favour of his child to be born of a woman who never becomes his wife. The bequest is void.

(viii) A makes a bequest in favour of the child of which a certain woman, not married to him, is pregnant. The bequest is valid

(This is sec. 87 of the Succession Act X of 1865).

COMMENTARY.

Illegitimate Children.—The description of child, son, issue, etc., mean *prima facie* legitimate child, son, issue, etc., and, therefore, where a bequest is made to children simply without anything on the face of the will to show that illegitimate children are meant, only the legitimate children will take and evidence dehors the will is not admitted to prove that illegitimate children were also meant. (See ill. i.).

Wherever the general description of children in a will will include legitimate children, it cannot be extended to illegitimate children; in other words, where there are legitimate children to answer the description of "children," the rule of law is, that legitimate children only will take and no extrinsic evidence is admissible to show the intention of the testator, *Dorin v. Dorin*, L. R. 7 H. L. 568; *Paul v. Children*, L. R. 12 Eq. 16; *Ellis v. Houstoun*, L. R. 10 Ch. D. 236; *In Re Pearce, Alliance Assurance Co., v. Francis*, (1913) 2 Ch. 674, (1914) 1 Ch. 254; (Williams on Executors, 10th Edn., pp. 853-859). But where a testator enumerates his children and names one of them who is illegitimate and leaves a legacy to his "said children" that is a sufficient indication that the illegitimate child is intended to take. (Ill. iii.). Where a testator had illegitimate children by a woman whom he afterwards married and died leaving a will giving a legacy to "his children" and the testator had no children except the illegitimate ones, it was held that the illegitimate children could not take the legacy. The testator might have had legitimate children, *Dorin v. Dorin*, L. R. 7 H. L. 568.

But illegitimate children will take under the description child, son, issue, etc., where there are no such legitimate relatives, if they have acquired at the date of the will the reputation of being the children of the person in question, (ill. v.). They generally take under the following circumstances.

In what cases illegitimate children may take.

(1) If looking at the circumstances existing at the date of the will there is no possibility of legitimate children to satisfy the terms of the bequest, *e. g.*, the bequest is to the children of A now living and A has illegitimate children, they would take, *Dover v. Alexander*, 2 Hare 275; *Barlow v. Orde*, L. R. 3 P. C. 164; (ill. ii.); or where the bequest is by an unmarried man or woman to his or her children, that would mean illegitimate children, because every will made by a man or woman is revoked by his or her marriage and, therefore, none but illegitimate children could by any possibility take under it, *Pratt v. Mathew*, 22 Beav. 328,

(2) Illegitimate children existing at the date of the will, including a child *en ventre* may take under the term children, if they are sufficiently indicated, that is to say, where it appears that the testator meant illegitimate children, *e. g.*, where the bequest is to "my natural children," *Metham v. Duke of Devonshire*, 1 P. Wms. 529; (iii. vi.).

(3) A bequest to *future* illegitimate children is void, as it is against public policy. (III. vii.). But a bequest to the child with which a woman is at the date of the will pregnant is a good bequest. (III. viii.; Theobald on Wills, 7th Edn., p. 293).

Reputed wife.—In *Adm.-General v. White*, 13 Bom. 379, it was held that if the bequest indicates sufficiently the subject of the testator's bounty, no strict proof of marriage will be required and the reputed wife would take.

101. Where a will purports to make two bequests to the same person, and a question arises whether the testator intended to make the second bequest instead of or in addition to the first; if there is nothing in the will to show what he intended, the following rules shall have effect in determining the construction to be put upon the will :—

Rules of construction where will purports to make two bequests to same person.

- (a) If the same specific thing is bequeathed twice to the same legatee in the same will or in the will and again in the codicil, he is entitled to receive that specific thing only.
- (b) Where one and the same will or one and the same codicil purports to make, in two places, a bequest to the same person of the same quantity or amount of anything, he shall be entitled to one such legacy only.
- (c) Where two legacies of unequal amount are given to the same person in the same will, or in the same codicil, the legatee is entitled to both.
- (d) Where two legacies, whether equal or unequal in amount, are given to the same legatee, one by a will and the other by a codicil, or each by a different codicil, the legatee is entitled to both legacies.

Explanation.—In clauses (a) to (d) of this section, the word "will" does not include a codicil.

Illustrations.

(i) A, having ten shares, and no more, in the Imperial Bank of India, made his will, which contains near its commencement the words "I bequeath my ten shares in the Imperial Bank of India to B." After other bequests, the will concludes with the words "and I bequeath my ten shares in the Imperial Bank of India to B." B is entitled simply to receive A's ten shares in the Imperial Bank of India.

(ii) A, having one diamond ring, which was given him by B, bequeaths to C the diamond ring which was given by B. A afterwards made a codicil to his will, and thereby, after giving other legacies, he bequeathed to C the diamond ring which was given him by B. C can claim nothing except the diamond ring which was given to A by B.

(iii) A, by his will, bequeaths to B the sum of 5,000 rupees and afterwards in the same will repeats the bequest in the same words. B is entitled to one legacy of 5,000 rupees only.

(iv) A, by his will, bequeaths to B the sum of 5,000 rupees and afterwards in the same will bequeaths to B the sum of 6,000 rupees. B is entitled to receive 11,000 rupees.

(v) A, by his will, bequeaths to B 5,000 rupees and by a codicil to the will he bequeaths to him 5,000 rupees. B is entitled to receive 10,000 rupees.

(vi) A, by one codicil to his will, bequeaths to B 5,000 rupees and by another codicil bequeaths to him 6,000 rupees. B is entitled to receive 11,000 rupees.

(vii) A, by his will, bequeaths "500 rupees to B because she was my nurse," and in another part of the will bequeaths 500 rupees to B "because she went to England with my children." B is entitled to receive 1,000 rupees.

(viii) A, by his will, bequeaths to B the sum of 5,000 rupees and also, in another part of the will, an annuity of 400 rupees. B is entitled to both legacies.

(ix) A, by his will, bequeaths to B the sum of 5,000 rupees and also bequeaths to him the sum of 5,000 rupees if he shall attain the age of 18. B is entitled absolutely to one sum of 5,000 rupees, and takes a contingent interest in another sum of 5,000 rupees.

(This is sec. 38 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Cumulative Legacies.—Where the testator has twice bequeathed a legacy to the same person, it becomes a question whether the legatee be entitled to both or only one, i. e., whether the second legacy shall be regarded as merely a *repetition* of the prior bequest, or whether it shall be construed as an additional bounty and *cumulative* to the former benefit. On this point the *intention* of the testator is the rule of construction.

If there is nothing in the will to show what the testator intended, the following rules of construction are laid down in the Act.

(1) If the same *specific thing*, e. g., a watch or a ring, is bequeathed twice to the same legatee in the same will or in the will and again in a codicil, the legatee receives only that specific thing.

(2) Where two legacies of *quantity of equal amount* are bequeathed to the same legatee in *one and the same instrument* the second bequest is a mere repetition and the legatee is entitled to one such legacy.

(3) Where two legacies of *quantity of unequal amount* are given to the same person in the *same instrument*, the legatee is entitled to both.

(4) Where two legacies of quantity, whether of *equal* or *unequal* amount, are given to the same person *by different instrument*, i. e., one by will and the other by a codicil, the legatee is entitled to both.

When is parol evidence admissible to show whether the testator intended to give two legacies or only one legacy? The rules as to substitutional or cumulative gifts are rules of presumption rather than rules of construction and parol evidence is admissible to rebut the presumption. It is admissible when the Court raises the presumption against double legacies, to show that the testator intended the legatee to take both, *i. e.*, in support of the apparent intention of the will. But where the Court does not raise the presumption parol evidence is not admissible to show that the testator intended the legatee to take one only, for that is in opposition to the will, *Hooley v. Hatton*, 2 White and Tudors L. C. 321, 1 Bro. C. C. 190.

In many cases the will or codicil affords intrinsic evidence that the second gift was intended as a mere substitution for the first. So, also, if in two instruments the legacies are not given *simpliciter*, but the motive of the gift is expressed, and the same sum is given, if the motive is different the legacies will be cumulative, (III. vii.). Again, where one legacy is given generally and the other for an express purpose or is contingent, the legacies will be cumulative (III. ix.), and also where the legacies are not *ejusdem generis*, *e. g.*, if an annuity and a sum of money are given the legacies will be cumulative. (III. viii.).

Cumulative and substitutional legacies are subject to the same incidents as the original legacies, *i. e.*, as regards vesting, lapse, etc.

102. A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

Constitution of residuary legatee.

Illustrations.

(i) A makes her will, consisting of several testamentary papers, in one of which are contained the following words:—"I think there will be something left, after all funeral expenses, etc., to give to B, now at school, towards equipping him to any profession he may hereafter be appointed to." B is constituted residuary legatee.

(ii) A makes his will, with the following passage at the end of it:—"I believe there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire B to do, and keep the residue for her own use and pleasure." B is constituted the residuary legatee.

(iii) A bequeaths all his property to B, except certain stocks and funds, which he bequeaths to C. B is the residuary legatee.

(This is sec. 89 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, *i. e.*, to Hindus formerly governed by the Hindu Wills Act).

103. Under a residuary bequest, the legatee is entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect.

Property to which residuary legatee entitled.

Illustration.

A by his will bequeaths certain legacies, of which one is void under section 118, and another lapses by the death of the legatee. He bequeaths the residue of his property to

After the date of his will A purchases a zamindari, which belongs to him at the time of his death. B is entitled to the two legacies and the zamindari as part of the residue.

(This is sec. 30 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 67, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

The Residuary Legatee.—No particular words are necessary to constitute a residuary legatee. It is sufficient if the intention of the testator be expressed that the surplus or residue of his estate shall be taken by the person or persons designated, *Fanindra v. Adm.-General*, 6 C. W. N. 321; *Manorama v. Kali Charan*, 31 Cal. 166, *e. g.*, a testator bequeaths to A "the rest of my property," or "the remainder of my property," or "the residue of my property," or even simply "I leave to A" (without stating what was left), these words will constitute A the residuary legatee. Even the words *et cetera* when not construed *ejusdem generis* are held to pass the whole residuary estate, *Chapman v. Chapman*, (1877) 4 Ch. D. 800; *Ashutosh v. Doorga Churn*, 5 Cal. 438, 6 I. A. 182. The words "surplus" and "residue" both have identical meaning. "Surplus" means that which is left over, "residue" means that which is left, *Chapman v. Brown*, 6 Ves. 404; *Dwarkanath v. Burroda Persaud*, 4 Cal. 443. The words money, goods, chattels, estate, and effects will also pass the residue, if not confined to things *ejusdem generis* (See also Williams on Executors, 10th Edn. pp. 1196-1197 as to what words will and what words will not convey the residue. See also illustrations to sec. 102). See *In Re Rustomji F. Lentin*, 22 Bom. L. R. 355.

Gift of the residue may be the gift of a particular residue or may be of a general residue. A particular residue is the residue of a particular portion of the testator's property, *e. g.*, if a testator disposes of a part of his land at X to A and the residue of that land to B, the bequest to B is the bequest of a particular residue and will not carry any portion of the general residue.

A general residuary gift passes every thing not disposed of, whether the testator has not attempted to dispose of it, or whether the disposition fails by lapse or any other event. If a testator in the same will gives the remainder of his property to A and makes B his residuary legatee, B will take only lapsed legacies, *Re Jessop*, 11 Ir. Ch. 424; *Davis v. Bennet*, 30 B. 226.

Hindus.—In construing the wills of Hindus care should be taken. The residuary clause in the form in which it appears in English wills is unknown and unless a testator has expressed a clear intention to give everything undisposed of to the residuary legatee, the legatee will not be entitled to it, *Kunthalammal v. Suryaprakasaraoya*, 38 Mad. 1096.

Property to which a Residuary Legatee is entitled.—A residuary legatee is entitled to all property belonging to the testator at the time of his death of which he has not made any testamentary disposition which is capable of taking effect, *Fanindra v. Adm.-General*, 6 C. W. N. 321; *Dwarkanath v. Burroda Persaud*, 4 Cal. 443; *Camani v. Barefoot*, 26 Mad. 433. In other words, he is entitled to whatever may fall into the residue after the making of the will, by lapse, invalid disposition, or other accident, or by acquirement subsequent to the date of the will.

(See ill. sec. 103). A residuary bequest carries not only everything not disposed of but everything that in the event turns out not to be disposed of, *e. g.*, where a testator bequeaths all his estate, *except* money laid out in stock, mortgage, etc., to A and the money in stock and on mortgages to B and B dies before the testator so that the gift to him lapses, A will take under the residuary bequest the property given to B, *Evans v. Jones*, 2 Coll. 516. But if the testator has shown some intention with regard to the excepted property inconsistent with its ever falling into the residue, effect must be given to that intention, *Jairam v. Kessourjee*, 4 Bom. L. R. 555. For example, A on board a ship made his will and gave to his mother, if alive, his gold rings, buttons, and chest of clothes, and to his executor who was on board with him his red box, arrack, and *all things not before bequeathed*; and at the time of his death A was entitled to leasehold estate by the death of his father of his right to which he was ignorant, the executor will not be entitled to the leasehold estate, *Cook v. Oakley*, 1 P. Wms. 302. (See Williams on Executors, 10th Edn., pp. 1198-1204).

A residuary legatee is entitled to the property over which the testator has a general power of appointment and which the testator has ineffectually attempted to appoint, *e. g.*, a testatrix, having a power of appointment over a sum of stock, appointed the stocks to her sons A and B, and she left the residue of her property to A. B died before her. It was held that A was entitled as residuary legatee to the share intended for B, *Spooner's Trusts*, 2 Sim. (N. S.) 129.

Rights of the Residuary Legatee.—"A residuary legatee has a right to insist that in the course of the first year after the testator's death the executor shall, if it be possible, pay the debts, legacies, and funeral and testamentary expenses so that the clear residue may be ascertained and paid over to him. In order to effect this object it is the duty of the executor to sell the estate or at all events so much of it as is required for the payment of debts, legacies and funeral and testamentary expenses," and to ascertain the clear residue as soon as possible, *Wightwick v. Lord*, 6 H. L. C. 217.

The executor would not be justified (though he may be entitled) in selling more than sufficient to pay debts, legacies, and funeral and testamentary expenses in the case of a residuary legatee being absolutely entitled to the residue. (See observations of Lord Cairns in *Cooper v. Cooper*, L. R. 7 H. L. 53).

104. If a legacy is given in general terms without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and, if he dies without having received it, it shall pass to his representatives.

(This is sec. 91 of the Succession Act X of 1885. It applies to Hindus within the territories mentioned in sec. 57, *i. e.*, to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Time of Vesting of Legacies.—This section and section 119 treat the subject of the vesting of legacies. This section provides for vesting when there is no time fixed. Sec. 119 treats of the subject of vesting when the legacy is payable at some time later than the death of the testator. Under this section legacies given in general

without specifying the time when the same should be paid vest in the legatee *from the day of the testator's death*, and in the event of the legatee dying after the testator but without receiving the legacy, his representatives shall be entitled to receive it. Unless, therefore, there is an intention to the contrary a legatee acquires a vested interest in the legacy given in general terms from the day of the death of the testator which interest is transmissible to his legal representatives in the event of the death of the legatee after the testator's death without receiving the legacy, though the rule is that the legacies are not payable until after the expiration of one year after the testator's death, (sec. 337). But when a future time is prescribed for the payment of the legacy, the legacy will not vest in the legatee until that time arrives. (For further observations on this subject see secs. 119-120). A legacy vested under this section is divested by the legatee disclaiming the legacy, *Lakshamma v. Ratnamma*, 38 Mad. 474.

105. (1) If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person.

In what case legacy lapses.

(2) In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

Illustrations.

(i) The testator bequeaths to B "500 rupees which B owes me." B dies before the testator; the legacy lapses.

(ii) A bequest is made to A and his children. A dies before the testator, or happens to be dead when the will is made. The legacy to A and his children lapses.

(iii) A legacy is given to A, and, in case of his dying before the testator, to B. A dies before the testator. The legacy goes to B.

(iv) A sum of money is bequeathed to A for life, and after his death to B. A dies in the lifetime of the testator; B survives the testator. The bequest to B takes effect.

(v) A sum of money is bequeathed to A on his completing his eighteenth year, and in case he should die before he completes his eighteenth year, to B. A completes his eighteenth year, and dies in the lifetime of the testator. The legacy to A lapses and the bequest to B does not take effect.

(vi) The testator and the legatee perished in the same shipwreck. There is no evidence to show which died first. The legacy lapses.

(This is sec. 92 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act with this addition that the words "son," "sons," "child" and "children" shall be deemed to include an adopted child; and the word "grand-children" shall be deemed to include the children whether adopted or natural born of a child whether adopted or natural born, and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son, see Schedule III., Cl. 5.)

COMMENTARY.

In what Cases a Legacy Lapses.—If the legatee does not survive the testator, the legacy cannot take effect, in technical terms, the legacy lapses, and will form a part of the residue; the executors or administrators of the legatee cannot

demand the same. Even when the legacy is given to a man and his executors, administrators, and assigns, if the legatee dies before the testator, the legacy lapses, *Elliot v. Davenport*, 1 P. Wms. 83. So also if the legatee happens to be dead before the making of the will, the legacy will lapse, (Ill. ii.). Where the testator and the legatee die together, *e. g.*, when both are drowned in the same ship and it is not proved who survived the other, the legacy will lapse. (See ill. vi.). In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator, and the onus of proof will be on the representatives. Not only a legacy but also a bequest to a debtor of the debt due from him will lapse like any other legacy, if the debtor does not survive the testator. (Ill. i.).

In *Bachman v. Bachman*, 6 All. 583 a testator directed his executors to sell and convert his property into money and to divide the same among several named legatees when they should attain 21 in case of males and in case of females when they attained that age or married. One of the legatees who had attained 21 died five months after the death of the testator leaving issue. *Held*, legacy vested in the deceased legatee and the issue were entitled to it.

The doctrine of lapse applies to contingent legacies (see ill. v.) and also to charities, *In re Rymer*, *Rymer v. Stanfield*, (1895) 1 Ch. 19. In the case of a contingent legacy it will lapse on the death of the legatee before the testator whether the contingency does or does not happen and the gift over will take effect, *Willing v. Baine*, 3 P. W. 113.

Exceptions.—A legacy will not lapse in the following cases:—

- (a) If there is an express intention to the contrary.
- (b) If a legacy is given to two persons jointly and one dies before the testator the other takes the whole (sec. 106).
- (c) Where the bequest is to a child or lineal descendants of the testator. (sec. 109).
- (d) Where the bequest is to a class. (sec. 111).
- (e) Where the bequest is to a trustee for another and the trustee dies before the testator the bequest does not lapse. (sec. 110).
- (f) Where the bequest is to charity, and there is a general charitable intention, the bequest will be applied *cy prés*.

Examples.

(1) A bequeaths to B Rs. 500 and also directs that a debt of Rs. 200 due to A from B should not be demanded by his executors as he released B from the debt. B dies before A. The legacy of Rs. 500 lapses. As to the debt of Rs. 200 the question is whether it was a release or a legacy, and it was held that it was a legacy which had also lapsed, *Maitland v. Adair*, 3 Ves. 231, with facts slightly altered. (Ill. i.).

(2) A legacy is given to A and his executors, administrators, and assigns. A dies before the testator. The legacy lapses, *Elliot v. Davenport*, 1 P. Wms. 83.

(3) A legacy is given "to A or his representatives," or "to A or his heirs." A dies before the testator. The legacy will not lapse; the word "or" generally implies a substitution so as to prevent a lapse, *Gittings v. McDermott*, 2 M. and K. 69.

(4) A legacy is given to trustees in trust for G for life and in case G should die in the lifetime of her husband, as she should appoint and in default of appointment to her children;

but if she should survive her husband then to her absolutely. G survived her husband but died in the lifetime of the testator. The legacy to G lapses and the children of G are not entitled, *Calthorpes v. Gough*, 3 Bro. C. C. 394 (See ill. v., sec. 105).

(5) A testator bequeathed a sum of money to his wife for life and after her death to A absolutely if he should be living at her decease, and if not, to A's son; A outlived the wife but died in the testator's lifetime. It was held the legacy to A lapsed and that the gift to his son did not take effect, *Williams v. Jones*, 1 Russ. Ch. 517.

(6) A legacy was given in trust for Sarah until she attained majority and then to pay the same to her. But if she should die a minor leaving a child or children then in trust for such child or children and in default of children to other persons. Sarah attained majority and married, but she died in the lifetime of the testator, leaving two children, *Held*, that the legacy lapsed and the children were not entitled, *Doo v. Brabant*, 3 Bro. C. C. 393.

Exception—Intention to the Contrary.—In order to prevent lapse the testator must not only express that the legacy shall not lapse if the legatee dies in his lifetime but he must give the legacy to some other person, *Sibley v. Cook*, 3 Atk. 572; *Browne v. Hope*, L. R. 14 Eq. 343; *Ward v. Grey*, 26 Beav. 485; *In re Smith, Prada v. Vandroy*, (1916) 2 Ch. 368; *Camini v. Barefoot*, 26 Mad. 433. (See ill. iii., & iv.). A mere declaration that the legacy shall not lapse is not effectual to prevent lapse, if the legatee die in the lifetime of the testator, and even a declaration that the legacy shall vest from the date of the will has been held not sufficient to prevent a lapse, *Browne v. Hope*, *supra*. But where a bequest is "to A or his heirs" or "to A or his issue," the word "or" is construed as substitutional so as to prevent a lapse, *Gittings v. McDermott*, 2 M. & K. 69.

In case of a legacy to a legatee for life with remainder to another legatee, if the tenant for life dies before the testator, the remainder over takes effect upon the death of the testator. (Ill. iv.). So, if a legacy be given to A on his completing the eighteenth year with a limitation over to B if A should die before completing the eighteenth year and A dies in the lifetime of the testator under the prescribed age, the legacy over to B does not lapse but will take effect. (See *Miller v. Warren*, 2 Vern. 207, and other cases cited in foot-note g Williams on Executors, 10th Edn., p. 967). But the rule is different when A dies in the lifetime of the testator *but after completing his eighteenth year*. In such a case every part of the bequest lapses, i. e., the legacy to A lapses and the legacy to B also does not take effect. See ill. v.).

Legacy does not lapse if one of two joint legatees die before testator. **106.** If a legacy is given to two persons jointly, and one of them dies before the testator, the other legatee takes the whole.

Illustration.

The legacy is simply to A and B. A dies before the testator. B takes the legacy.

(This is sec. 93 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act.)

107. If a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then, if any legatee dies before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.

Effect of words showing testator's intention to give distinct shares.

Illustration.

A sum of money is bequeathed to A, B and C, to be equally divided among them. A dies before the testator. B and C will only take so much as they would have had if A had survived the testator.

(This is sec. 94 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Sec. 106 deals with a bequest to persons as joint tenants; sec. 107 with a bequest to persons as tenants-in-common. The essential characteristics of a joint tenancy are (1) unity of possession, (2) unity of interest, (3) unity of title and (4) unity of the time of commencement of title. A tenancy in common has only unity of possession.

Bequest to joint tenants.—This is exception (b) to the doctrine of lapse. If a legacy be given to two persons *jointly*, and one of them dies before the testator, the other legatee takes the whole, and so also, if the bequest is to several persons as joint tenants, the share of any one that dies will not lapse but will go to the survivor or survivors, *Mamubai v. Dossa Morarjee*, 15 Bom. 443. Again according to the principle of *Humphrey v. Tayleur*, 1 Ambl. 136, "If an estate is limited to two jointly, the one capable of taking, the other not, he who is capable takes the whole." See *Nandi Singh v. Sita Ram*, 16 Cal. 677 (P. C.), 16 I. A. 44. In *Arakal v. Domingo*, 34 Mad. 80 it was held that where there are no words in an instrument of gift of property to several persons indicating an intention to create tenancies in common there is a presumption that the donees take the property as joint tenants, see also, *Jairam v. Kuverbai*, 9 Bom. 491. But if the bequest be to several persons as tenants-in-common, in other words where distinct shares are given to the legatees, the share of the deceased shall not go to the survivors but shall lapse and form a part of the residue. A simple money legacy to A and B without more is a joint tenancy, *Crooke v. De Vandes*, 9 Ves. 197; see also *Naproji M. Wadia v. Perozbai*, 23 Bom. 80; *Francis Ghosal v. Gabri Ghosal*, 31 Bom. 25. Also a legacy given to a husband and wife without more will create a joint tenancy, *Re March*, 27 C. D. 166; *Vyadinada v. Nagammal*, 11 Mad. 258. This case, however, is overruled by *Jageswar v. Ram Chund*, 23 I. A. 37. But as equity leans against joint tenancy a slight indication in the will, that the legatees shall take separate share will prevent the application of this rule, e. g., where the legacy is to A and B, "share and share alike," (*Heathe v. Heathe*, 2 Atk. 122, contra, *Lakshmibai v. Ganpat*, 41 Bom. H. C. R. 150, O. C. J. in appeal 5 Bom. H. C. R. 128) or "in equal shares," (*Har Prasad v. Sukhdevi*, 37 All. 241; *Brown v. Oakshott*, 24 Beav. 254) or "respectively," (*Heathe v. Heathe*, *supra*) or "between them" (*Lashbrook v. Cock*, 4 Mer. 70). See also *Gopi v. Musammatal-Jaldhara*, 33 All. 41 where a Hindu bequeathed the whole of his property to his two married daughters without specification of shares and it was held, following the Privy Council case, *Jageswar Narain Deo v. Ram Chund Dutt*, 23 I. A. 37 that the estate taken by the legatees was a tenancy in common and not a joint tenancy. See also *Ram Piari v. Krishna Piari*, 43 All. 600; *Har Prasad v. Sukhdevi*, 37 All. 241; *Hirabai v. Lakshmibai*, 11 Bom. 573.

Where a legacy is given to A and B "to be equally divided between them or the survivor of them" the survivorship is to be referred to the period of division, *i. e.*, if there is no previous bequest then the death of the testator. And if A and B survive the testator they take the bequest as tenants-in-common in equal shares and on the death of either A or B thereafter the share of the one so dying will not go to the survivor. But if A dies before the testator and B survives the testator, the bequest will go to B. (Ill. *i.*, sec. 125). If a previous life estate is given, the period of division is the death of the tenant for life. If the tenant for life dies in the testator's lifetime, the survivors are fixed at the testator's death, *Daniell v. Daniell*, 6 Ves. 297. In *Camini v. Barefoot*, 26 Mad. 433, a testator devised a certain property to his wife for life and then to his children J, C and F, or the survivors or survivor of them. J attested the will. On the death of the wife F. brought a suit claiming a moiety of the property as J was debarred from taking the gift. It was held that J's share had lapsed and fell into the residue and did not augment the share of C and F. (The subject of "Survivorship" is further treated under sec. 125).

Bequest to a class.—Where the bequest is to a class of persons as tenants-in-common the share of any member of the class who predeceases the testator does not lapse but goes to the other members of the class. Where the bequest is to several named persons as tenants-in-common, the shares of any who die before the testator lapse, *Page v. Page*, 2 P. Wms. 489.

108. Where a share which lapses is a part of the general residue bequeathed by the will, that share shall go as undisposed of.

When lapsed share goes as undisposed of.

Illustration.

The testator bequeaths the residue of his estate to A, B and C, to be equally divided between them. A dies before the testator. His one-third of the residue goes as undisposed of.

(This is sec. 95 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 67, *i. e.*, to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Under sec. 103 a legacy that lapses will form a part of the residue and will go to the residuary legatee. This section comes into operation when the residue itself lapses by the death of the residuary legatee before the testator or in any other manner. Where the residue is undisposed of or lapses it will go as an intestacy and be divided amongst the next-of-kin of the deceased and all the next-of-kin will share in spite of the fact of any one being expressly excluded by the will, *Toolseydas v. Premji*, 13 Bom. 61; *Erasha v. Jerbai*, 4 Bom. 537; *Johnson v. Johnson*, 4 Beav. 318. If the residue that lapses is of a particular residue, it will fall into the general residue. When there are several residuary legatees and the residue is given to them as tenants-in-common the share of any one, who dies in the testator's lifetime, will lapse and will not accrue in augmentation of the remaining parts as a residue of a residue but will devolve as undisposed of, when a bequest is declared void and there is no disposition of residue it would be dealt with under this section, *Adm.-General v. Lazar*, 4 Mad. 244.

109. Where a bequest has been made to any child or other lineal descendant of the testator, and the legatee dies in the lifetime of the testator, but any lineal descendant of his survives the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the will.

When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime.

Illustration.

A makes his will, by which he bequeaths a sum of money to his son, B, for his own absolute use and benefit. B dies before A, leaving a son, C, who survives A, and having made his will whereby he bequeaths all his property to his widow, D. The money goes to D.

(This is sec. 96 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act, with this addition that the words "son," "sons," "child" and "children" shall be deemed to include an adopted child, and the word "grand-children" shall be deemed to include the children whether adopted or natural born of a child whether adopted or natural born and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son. See Schedule iii, cl. 5).

COMMENTARY.

This section is exception (c) to the doctrine of lapse. Where a bequest is made to any *child* or other *lineal descendant* of the testator and the legatee dies in the testator's lifetime, but any lineal descendant of his survives the testator, the bequest does not lapse, but takes effect as if the legatee had survived the testator, unless there is a contrary intention. This section does not substitute for the predeceased legatee the lineal descendant whose existence is the event or condition which excludes the lapse, but gives the legacy to him absolutely as though he had survived the testator, and it is therefore disposable by the will of the legatee. (See *ill.*, *Johnson v. Johnson*, 3 Hare, 157. Further the expression used is "lineal descendant." Therefore it does not extend to any other heir of the deceased legatee, *Ramamiratham v. Ranganathan*, 24 Mad. 299. To prevent lapse under this section it is not necessary that the lineal descendant who is alive at the death of the testator, should be the same lineal descendant who was alive at the death of the legatee. It is sufficient that any lineal descendant, *e. g.*, a grandchild of the legatee, should be in existence at the death of the testator, *In the goods of Parker*, 1 Sw. & Tr, 523. Further the legacy will not go to the lineal descendant of the child of the testator but will be deemed to belong to the predeceased child of the testator and will go to all his heirs if he has died intestate or will belong to those under his will if he has died leaving a will, see illustration.

Examples.

(1) A father by his will bequeathed his house to his son and the son died in his father's lifetime leaving issue and leaving a will by which he bequeathed all his estate and effects to his father. *Held*, that by virtue of sec. 33 of the English Wills Act corresponding to sec. 103 of the Succession Act the house passed under the father's will to the son absolutely and as the son must be deemed to have survived his father, the devise under the son's will failed and there was an intestacy in respect of it, *Re Hensler*, 19 C. D. 612.

(2) A testator gave Rs. 5,000 to his son's daughter J. The testator died in 1881. J died in 1879 leaving a child B. B sued to recover the legacy. *Held*, J was in point of law in

Where a legacy is given to A and B "to be equally divided between them or the survivor of them" the survivorship is to be referred to the period of division, *i. e.*, if there is no previous bequest then the death of the testator. And if A and B survive the testator they take the bequest as tenants-in-common in equal shares and on the death of either A or B thereafter the share of the one so dying will not go to the survivor. But if A dies before the testator and B survives the testator, the bequest will go to B. (Ill. *i.*, sec. 125). If a previous life estate is given, the period of division is the death of the tenant for life. If the tenant for life dies in the testator's lifetime, the survivors are fixed at the testator's death, *Daniell v. Daniell*, 6 Ves. 297. In *Camini v. Barefoot*, 26 Mad. 433, a testator devised a certain property to his wife for life and then to his children J, C and F, or the survivors or survivor of them. J attested the will. On the death of the wife F. brought a suit claiming a moiety of the property as J was debarred from taking the gift. It was held that J's share had lapsed and fell into the residue and did not augment the share of C and F. (The subject of "Survivorship" is further treated under sec. 125).

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When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime

Illustration.

A makes his will, by which he bequeaths a sum of money to his son, B, for his own absolute use and benefit. B dies before A, leaving a son, C, who survives A, and having made his will whereby he bequeaths all his property to his widow, D. The money goes to D.

(This is sec 90 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act, with this addition that the words "son," "sons," "child" and "children" shall be deemed to include an adopted child, and the word "grand-children" shall be deemed to include the children whether adopted or natural born of a child whether adopted or natural born and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son. See Schedule iii., cl. 5).

COMMENTARY.

This section is exception (c) to the doctrine of lapse. Where a bequest is made to any child or other lineal descendant of the testator and the legatee dies in the testator's lifetime, but any lineal descendant of his survives the testator, the bequest does not lapse, but takes effect as if the legatee had survived the testator, unless there is a contrary intention. This section does not substitute for the predeceased legatee the lineal descendant whose existence is the event or condition which excludes the lapse, but gives the legacy to him absolutely as though he had survived the testator, and it is therefore disposable by the will of the legatee. (See ill.), *Johnson v. Johnson*, 3 Hare, 157. Further the expression used is "lineal descendant." Therefore it does not extend to any other heir of the deceased legatee, *Ramamiratham v. Ranganathan*, 24 Mad. 299. To prevent lapse under this section it is not necessary that the lineal descendant who is alive at the death of the testator, should be the same lineal descendant who was alive at the death of the legatee. It is sufficient that any lineal descendant, e.g., a grandchild of the legatee, should be in existence at the death of the testator, *In the goods of Parker*, 1 Sw. & Tr, 523. Further the legacy will not go to the lineal descendant of the child of the testator but will be deemed to belong to the predeceased child of the testator and will go to all his heirs if he has died intestate or will belong to those under his will if he has died leaving a will, see illustration.

Examples.

(1) A father by his will bequeathed his house to his son and the son died in his father's lifetime leaving issue and leaving a will by which he bequeathed all his estate and effects to his father. Held, that by virtue of sec. 33 of the English Wills Act corresponding to sec. 109 of the Succession Act the house passed under the father's will to the son absolutely and as the son must be deemed to have survived his father, the devise under the son's will failed and there was an intestacy in respect of it, *Re Hensler*, 19 C. D. 612.

(2) A testator gave Rs. 5,000 to his son's daughter J. The testator died in 1881. J died in 1879 leaving a child B. B sued to recover the legacy. Held, J was in point of law in

Where a legacy is given to A and B "to be equally divided between them or the survivor of them" the survivorship is to be referred to the period of division, *i. e.*, if there is no previous bequest then the death of the testator. And if A and B survive the testator they take the bequest as tenants-in-common in equal shares and on the death of either A or B thereafter the share of the one so dying will not go to the survivor. But if A dies before the testator and B survives the testator, the bequest will go to B. (Ill. i., sec. 125). If a previous life estate is given, the period of division is the death of the tenant for life. If the tenant for life dies in the testator's lifetime, the survivors are fixed at the testator's death, *Daniell v. Daniell*, 6 Ves. 297. In *Camini v. Barefoot*, 26 Mad. 433, a testator devised a certain property to his wife for life and then to his children J, C and F, or the survivors or survivor of them. J attested the will. On the death of the wife F. brought a suit claiming a moiety of the property as J was debarred from taking the gift. It was held that J's share had lapsed and fell into the residue and did not augment the share of C and F. (The subject of "Survivorship" is further treated under sec. 125).

Bequest to a class.—Where the bequest is to a class of persons as tenants-in-common the share of any member of the class who predeceases the testator does not lapse but goes to the other members of the class. Where the bequest is to several named persons as tenants-in-common, the shares of any who die before the testator lapse, *Page v. Page*, 2 P. Wms. 489.

108. Where a share which lapses is a part of the general residue bequeathed by the will, that share shall go as undisposed of.

When lapsed share goes as undisposed of.

Illustration.

The testator bequeaths the residue of his estate to A, B and C, to be equally divided between them. A dies before the testator. His one-third of the residue goes as undisposed of.

(This is sec. 95 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Under sec. 103 a legacy that lapses will form a part of the residue and will go to the residuary legatee. This section comes into operation when the residue itself lapses by the death of the residuary legatee before the testator or in any other manner. Where the residue is undisposed of or lapses it will go as an intestacy and be divided amongst the next-of-kin of the deceased and all the next-of-kin will share in spite of the fact of any one being expressly excluded by the will, *Toolseydas v. Premji*, 13 Bom. 61; *Erasha v. Jerbai*, 4 Bom. 537; *Johnson v. Johnson*, 4 Beav. 318. If the residue that lapses is a part of the residue, as when the residue is a tenancy, it will not accrue in augmentation of the remaining parts as a residue of a residue but will devolve as undisposed of, when a bequest is declared void and there is no disposition of residue it would be dealt with under this section, *Adm.-General v. Lazar*, 4 Mad. 244.

109. Where a bequest has been made to any child or other lineal descendant of the testator, and the legatee dies in the lifetime of the testator, but any lineal descendant of his survives the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the will.

When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime.

Illustration.

A makes his will, by which he bequeaths a sum of money to his son, B, for his own absolute use and benefit. B dies before A, leaving a son, C, who survives A, and having made his will whereby he bequeaths all his property to his widow, D. The money goes to D.

(This is sec 96 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act, with this addition that the words "son," "sons," "child" and "children" shall be deemed to include an adopted child, and the word "grand children" shall be deemed to include the children whether adopted or natural born of a child whether adopted or natural born and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son. See Schedule iii, cl. 5).

COMMENTARY.

This section is exception (c) to the doctrine of lapse. Where a bequest is made to any child or other lineal descendant of the testator and the legatee dies in the testator's lifetime, but any lineal descendant of his survives the testator, the bequest does not lapse, but takes effect as if the legatee had survived the testator, unless there is a contrary intention. This section does not substitute for the predeceased legatee the lineal descendant whose existence is the event or condition which excludes the lapse, but gives the legacy to him absolutely as though he had survived the testator, and it is therefore disposable by the will of the legatee. (See ill.), *Johnson v. Johnson*, 3 Hare, 157. Further the expression used is "lineal descendant." Therefore it does not extend to any other heir of the deceased legatee, *Ramamiratham v. Ranganathan*, 24 Mad. 299. To prevent lapse under this section it is not necessary that the lineal descendant who is alive at the death of the testator, should be the same lineal descendant who was alive at the death of the legatee. It is sufficient that any lineal descendant, e. g., a grandchild of the legatee, should be in existence at the death of the testator, *In the goods of Parker*, 1 Sw. & Tr. 523. Further the legacy will not go to the lineal descendant of the child of the testator but will be deemed to belong to the predeceased child of the testator and will go to all his heirs if he has died intestate or will belong to those under his will if he has died leaving a will, see illustration.

Examples.

(1) A father by his will bequeathed his house to his son and the son died in his father's lifetime leaving issue and leaving a will by which he bequeathed all his estate and effects to his father. Held, that by virtue of sec. 33 of the English Wills Act corresponding to sec. 109 of the Succession Act the house passed under the father's will to the son absolutely and as the son must be deemed to have survived his father, the devise under the son's will failed and there was an intestacy in respect of it, *Re Hensler*, 19 C. D. 612.

(2) A testator gave Rs. 5,000 to his son's daughter J. The testator died in 1881. J died in 1879 leaving a child B. B sued to recover the legacy. Held, J was in point of law in

existence at the time of the testator's death under sec. 109, because a lineal descendant of hers survived the testator and B was entitled to the legacy, *Jitu Lal v. Binda Bibi*, 16 Cal. 549.

(3) A testator gives a certain property to his wife for life and after her death to his three children J, C, and F, or the survivors and survivor of them and he bequeathed the residue to his wife. J. attested the will. F brought a suit to declare that as J was incapacitated, F was entitled to one-half. *Held*, F was only entitled to one-third. J's share fell into the residue as the words survivors or survivor referred to the death of the legatee in the testator's lifetime, *Camani v. Barefoot*, 26 Mad. 433.

110. Where a bequest is made to one person for the benefit of another, the legacy does not

Bequest to A for benefit of B does not lapse by A's death.

lapse by the death, in the testator's lifetime, of the person to whom the bequest is made.

(*This is sec. 97 of the Succession Act X of 1885. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act.*)

COMMENTARY.

This section is exception (e) to the doctrine of lapse.

111. Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as are alive at the testator's death.

Survivorship in case of bequest to described class.

a described class of persons, the thing bequeathed shall go only to such as are alive at the testator's death.

Exception.—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as are then alive, and to the representatives of any of them who have died since the death of the testator.

Illustrations.

(i) A bequeaths 1,000 rupees to "the children of B" without saying when it is to be distributed among them. B had died previous to the date of the will, leaving three children, C, D and E. E died after the date of the will, but before the death of A. C and D survive A. The legacy will belong to C and D, to the exclusion of the representatives of E.

(ii) A lease for years of a house was bequeathed to A for his life, and after his decease to the children of B. At the death of the testator, B had two children living, C and D, and he never had any other child. Afterwards, during the lifetime of A, C died, leaving E, his executor. D has survived A. D and E are jointly entitled to so much of the leasehold term as remains unexpired.

(iii) A sum of money was bequeathed to A for his life, and after his death to the children of B. At the death of the testator, B had two children living, C and D, and he never had any other child. At that event, two children, E and F, were born. A died, leaving D and F surviving her. The legacy is to be divided into four equal parts, one of which is to be paid to the executor of C, one to D, one to the administrator of E and one to F.

(iv) A bequeaths one-third of his lands to B for his life, and after his decease to the sisters of B. At the death of the testator, B had two sisters living, C and D, and after that

event another sister E was born. C died during the life of B, D and E have survived B. One-third of A's lands belong to D, E and the representatives of C, in equal shares.

(v) A bequeaths 1,000 rupees to B for life and after his death equally among the children of C. Up to the death of B, C had not had any child. The bequest after the death of B is void.

(vi) A bequeaths 1,000 rupees to "all the children born or to be born" of B to be divided among them at the death of C. At the death of the testator, B has two children living, D and E. After the death of the testator, but in the lifetime of C, two other children, F and G, are born to B. After the death of C, another child is born to B. The legacy belongs to D, E, F and G, to the exclusion of the after-born child of B.

(vii) A bequeaths a fund to the children of B, to be divided among them when the eldest shall attain majority. At the testator's death, B had one child living, named C. He afterwards had two other children, named D and E. E died, but C and D were living when C attained majority. The fund belongs to C, D and the representatives of E, to the exclusion of any child who may be born to B after C's attaining majority.

(This is sec 98 of the Succession Act X of 1865 III. (b) is omitted. It applies to Hindus within the territories mentioned in sec. 57, i. e. to Hindus formerly governed by the Hindu Wills Act, with this addition that the words "son," "sons," "child" and "children" shall be deemed to include an adopted child; and the word "grand-children" shall be deemed to include the children whether adopted or natural born of a child whether adopted or natural born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son. See Schedule III, cl. 5).

COMMENTARY.

This section must be read with sec. 98, 115, and 121.

Period of Distribution.—In the case of a bequest to a class the time when the gift is to take effect in enjoyment is called the period of distribution. When the period of distribution is the date of the death of the testator the bequest is said to be immediate. When it is subsequent to the death of the testator the bequest is said to be postponed. This section deals with the period of distribution. The first portion indicates the immediate period of distribution and the exception deals with postponed period of distribution.

(a) The rule for ascertaining the class where the bequest is immediate is simple, e. g. if a bequest is made to the children of A those children who are living at the testator's death will take to the exclusion of those born afterwards (ill. i.), *Adv. General v. Karmali*, 29 Bom. 133. If A has no children at the testator's death the bequest is void, (sec. 112). It is not so according to English law; there the bequest would go to all the children of A born at any time after the death of the testator, (see Halsbury's Laws of England, Vol. 28, p. 716, footnote a).

(b) The period of distribution may be postponed through (1) conditions attached to the gift or (2) by nature of the property given or by some prior gift and the rules for ascertaining the class are perplexing and here comes into operation the rule against perpetuity which makes the subject more difficult. However, the following are the principles deducible from English standard works.

(1) If the bequest is simply to "All the children of A on the eldest child of A attaining majority" it is a good bequest and the period of distribution is the attainment of majority by the eldest son of A. (See ill. vii.). If the eldest son dies a minor

then the period of distribution is when the next son of A attains majority. Similarly if the bequest is to "All the children of A when they attain the age of 21" the bequest is good and the period of distribution is as follows:—If any child of A had attained the age of 21 at the death of the testator the period of distribution is the death of the testator, *Hagger v Payne*, 23 Beav. 474. If not then the period is fixed after the death of the testator at the date when any child of A first attains that age. The share of each child becomes vested on its attaining 21, such share would vary directly as the number of children who had then died infants and that on each child attaining majority it would take a contingent proportionate interest in the share of each of its junior brothers and sisters which would become vested on the death of each of the latter under 21, *Agnew v. Mathews*, 1 M. H. C. R. 17. (See Gray on Perpetuities, 3rd Edn., p. 332). On the other hand if the bequest is to all the grandchildren of the testator on their attaining 25, such a gift is bad for the vesting is postponed for more than 21 years. The cases in which gifts by will to the grand children of the testator or to the children of a living person on their attaining the age greater than 21 have been held void are given at page 374 of Gray on Perpetuities, 3rd Edn, and the subject is treated under sec. 115. On the same principle a bequest "to the children of A who attain 21 and the sons who attain 21 of such of the children of A as die under 21 *per stirpes* is void; for here the class is composed of children and grand children and the vesting in the grand children is postponed beyond the rule against perpetuities. (Law of Perpetuities by Asutosh Mukhopadhyay, p. 148; Gray on Perpetuities, 3rd Edn., p. 338). But a gift by the testator "to all my children when they attain the age of 25" or "to such children of A as shall attain the age of 25" A having died before the testator is a good bequest as the bequest is to all the persons existing at the death of the testator, *Southern v. Woollaston*, 16 Beav. 166; *Williams v. Teale*, 6 Hare 239, and the period of distribution is when any child attains the particular age. (See Law of Perpetuities in British India by Mukhopadhyay, p. 100; see the illustration where the children of a third person and not the testator's own children are spoken of).

There are further a certain number of cases of a gift to a class fixing the period of distribution when the youngest member of the class shall attain majority. In *Leeming v. Sherratt*, 2 Hare 14 there was a gift of residue to trustees for sale and conversion "when the youngest of my children shall attain the age of 21 years equally share and share alike." One child who had attained 21 died before the youngest child attained 21. It was held that he had a vested interest and was transmissible to his representatives. All the cases on this point were considered in the case of *Lodwig v. Evans*, (1916) 2 Ch. 27; see also *In re Kipping*, *Kipping v. Kipping*, (1914) 1 Ch. 62. In *Maseyk v. Fergusson*, 4 Cal. 670, a testator gave the residue of his property upon trust to divide the same "among the children of my brothers A and B to be divided amongst them in the proportion of two shares to males and one share to females the share of each son to be paid to him on his attaining 21 and the share of each daughter on her attaining that age or marrying whichever first occurred." After the death of the testator but before the period of distribution a son was born to B and one of the sons of A died intestate and unmarried. Held that the period of distribution was when any one son attained majority or any one daughter married whichever first occurred and that the after born son of B was entitled and that the share of the deceased son of A went to his surviving brothers and sisters in equal shares.

The rule to be deduced from these cases is known as the rule in "*Andrews v. Partington*," (1791) 3 Bro. C. C. 401. "Where the postponement of enjoyment is due to conditions attached to the gift the period of distribution is considered to be as soon as the conditions are so far performed that some one member of the class would be entitled to the enjoyment of his share if the class were then not susceptible of increase" (Halsbury's Laws of England, Vol. 28, p. 718).

(2) Rules for ascertaining the period of distribution where there is an intervening life interest are as follows:—If the bequest is by way of legal remainder to a class all the members of the class who are living at the death of the testator take a vested interest, letting in all who come into existence after the death of the testator and before the termination of the life interest, they in their turn also taking a vested interest (see ill. ii., iii., iv., vi.). In *Pestonji v. Khurshedbai*, 7 Bom. L. R. 207, a bequest was made to Dossibai for life and after her death the corpus was to be divided between her issue according to the Parsi Intestate Succession Act. The testator died in 1885 when Dossibai had two sons and two daughters. One son F died in 1899. One daughter died in 1885. Dossibai died in 1904. It was held that the legacy became vested in the issue of Dossibai on testator's death and that Dossibai was the stock and not the testator.

If the bequest is to A for life, then to the children of B who shall attain the age of eighteen years, the class will be fixed as regards exclusion at the death of A, or when the eldest child of B attains eighteen, whichever is last, e. g., a bequest is made to A for life with remainder to the children of B on their attaining the age of eighteen years. B has three children C, D, and E. C has attained the age of eighteen years when A died. The bequest will go to C, D and E to the exclusion of any child of B born afterwards. If C had not attained majority when A died and if F is born to B before C attains that age, the bequest will go to C, D, E, and F to the exclusion of any child born afterwards.

A child en ventre sa mère at the time when the class closes must be admitted to a share, even though the word "living" or "born" be added to the description, *Doe v. Clarke*, 2 H. Bl. 399.

As the interest vests in each member of the class as he comes into being, although he may die before the period of distribution, the representatives of such as have died since the death of the testator will be entitled along with those alive at the period of distribution. (See ill. iv. and v.).

The words "born or to be born" will not extend the class when the gift is after a life estate, *Sprackling v. Ranier*, 1 Dick. 344. When there is a direct gift to children (without any intervention of a life estate) the words "born or to be born" would probably be held to be intended to refer to children born between the date of the will and the death of the testator, *Dias v. De Livera*, 5 App. C. 123. (See ill. vi.).

Example

A bequest is made by a testator to his children E, L, and T for their respective lives and afterwards for their respective children, provided if any child died without leaving a child entitled to take under the will, the share of such child should go to their "then surviving" brothers and sisters if more than one in equal shares, and if only one, then to him or her absolutely. E, L, and T all survived the testator. E died first leaving children. Then L died without issue, leaving T surviving. E's children claimed a share in L's share. Held: children of E took no part of L's share. The words "then surviving" must receive its natural and ordinary meaning, *Jnderick v. Tutchell*, (1903) A. C. 120.

CHAPTER VII.

Of Void Bequests.

Introduction.

There are four cases in which a bequest becomes void, and these are treated in this chapter. They are:—(a) A bequest to a person who is not in existence at the testator's death is void.

(b) A bequest to a person who is not in existence at the testator's death subject to a prior bequest is void unless it comprises the whole of the testator's interest, in other words a life interest to an unborn person is void.

(c) A bequest the vesting of which is delayed beyond the life of existing person and 18 years is void.

(d) A bequest to charity by a testator having a nephew or niece or nearer relation is void unless the will is executed 12 months before his death and deposited with the Registrar within six months of its execution.

Bequest to person by particular description, who is not in existence at testator's death

112. Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.

Exception.—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or, if he is dead, to his representatives.

Illustrations.

(i) A bequeaths 1,000 rupees to the eldest son of B. At the death of the testator, B has no son. The bequest is void.

(ii) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator, C had no son. Afterwards, during the life of B, a son is born to C. Upon B's death the legacy goes to C's son.

(iii) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator, C had no son. Afterwards, during the life of B, a son, named D, is born to C. D dies, then B dies. The legacy goes to the representative of D.

(iv) A bequeaths his estate of Green Acre to B for life, and at his decease, to the eldest son of C. Up to the death of B, C has had no son. The bequest to C's eldest son is void.

(v) A bequeaths 1,000 rupees to the eldest son of C, to be paid to him after the death of B. At the death of the testator C has no son, but a son is afterwards born to him during the life of B and is alive at B's death. C's son is entitled to the 1,000 rupees.

(This is sec. 99 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act, with this addition that the words "son," "sons," "child" and "children" shall be deemed to include an adopted child and the word "grand-children," shall be deemed to include the children whether adopted or natural born of a child whether adopted or natural born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son).

COMMENTARY.

Bequest to unborn person.—This section deals with the case (a) of void bequest. It is a simple case and the proposition laid down is this, that if the legatee is not in existence when it becomes payable the bequest is void. Ordinarily a legacy becomes payable on the death of the testator. If the legatee is not born then, it is void, *Advocate-General v. Karmali*, 6 Bom. L. R. 601.

Prima facie a gift to the wife of A who has a wife living at the date of the will goes to that wife and no other, *Burrows Trusts*, 10 L. T. N. S. 184. If A has no wife at the date of the will, it will go to the wife of A living at the testator's death. If A has no wife living at the testator's death the bequest will be void. (Ill. i.), *Dinesh Chandra v. Biraj Kamini*, 39 Cal. 87. According to English law in the last case the bequest will go to any woman who shall first answer the description of the wife of A at any subsequent period. (Jarman on Wills, 5th Edn. p. 303).

Exception.—Exception deals with the case of a deferred bequest to an unborn person. In order to entitle an unborn person to take he must come into existence when the bequest becomes payable. If he has once been born it is immaterial whether he is alive or dead at the termination of the prior estate. His representatives will take (see ill. iii., and v.).

A bequest by a Hindu to his son's would-be wife who was in existence at the death of the testator may be deemed to be a bequest to a person described as standing in a particular degree of kindred to his son within the meaning of exception to sec. 112 and is valid, *Dinesh Chandra v. Biraj Kamini*, 39 Cal. 87. The word "kindred" in the exception must not be construed strictly, *Dinesh Chandra v. Biraj Kamini*, 15 C. W. N. 945. This section must be distinguished from sec. 105. Section 105 deals with the case of a legatee who is born but dies before the testator and the legacy lapses and falls into the residue. Under this section the legacy is to an unborn person and becomes altogether void and will be distributed as on intestacy.

113. Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

* Bequest to person not in existence at testator's death, subject to prior bequest.

Illustrations.

(i) Property is bequeathed to A for his life, and after his death to his eldest son for life and after the death of the latter to his eldest son. At the time of the testator's death, A has no son. Here the bequest to A's eldest son is a bequest to a person not in existence

at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to A's eldest son for his life is void.

(ii) A fund is bequeathed to A for his life, and after his death to his daughters. A survives the testator. A has daughters some of whom were not in existence at the testator's death. The bequest to A's daughters comprises the whole interest that remains to the testator in the thing bequeathed. The bequest to A's daughters is valid.

(iii) A fund is bequeathed to A for his life, and after his death to his daughters, with a direction that, if any of them marries under the age of eighteen, her portion shall be settled so that it may belong to herself for life and may be divisible among her children after her death. A has no daughters living at the time of the testator's death, but has daughters born afterwards who survive him. Here the direction for a settlement has the effect in the case of each daughter who marries under eighteen of substituting for the absolute bequest to her a bequest to her merely for her life, that is to say, a bequest to a person not in existence at the time of the testator's death of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund is void.

(iv) A bequeaths a sum of money to B for life, and directs that upon the death of B the fund shall be settled upon his daughters, so that the portion of each daughter may belong to herself for life, and may be divided among her children after her death. B has no daughter living at the time of the testator's death. In this case the only bequest to the daughters of B is contained in the direction to settle the fund, and this direction amounts to a bequest to persons not yet born, of a life-interest in the fund, that is to say, of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund upon the daughters of B is void.

(This is section 100 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act, with this addition that the words "son" "sons," "child," and "children" shall be deemed to include an adopted child; and the word "grand-children" shall be deemed to include the children whether adopted or natural born of a child whether adopted or natural born and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son).

COMMENTARY.

This section is often confounded with section 114 as a rule against perpetuities, but it is not so. The perpetuity section is 114. This section deals with the subject of gifts to unborn persons and it lays down the limit of the *quantum* of interest that can be given to an unborn person, *viz.*, that you cannot give a life interest or any other limited interest to an unborn person, that if a bequest is intended to be made in favour of an unborn person, then the testator must give the whole of the beneficial interest to that unborn child in order that it should be valid, and that if the whole interest is not given such a bequest is wholly void, *Putlibai v. Sorabji*, 25 Bom. L. R. 1099 (P. C.). This section has nothing to do with the vesting of the bequest unto the unborn person but deals only with the *quantum*. To what limit the vesting can be postponed is the rule against perpetuity which is treated in the next section 114. A similar provision is made as regards gift *inter vivos* by sec. 13 of the Transfer of Property Act. Sec. 113 of this Act and sec. 13 of the Transfer of Property Act are a slight departure from English Law.

English Law different.—According to English law interest may be given to an unborn person for life or until marriage or until any other event provided it must vest within the proper period; or, so far as the rule against perpetuity alone is concerned an interest may be given to a succession of unborn persons whose interests

are vested within the proper period; or to a number of unborn persons for life as tenants-in-common. In each of these cases the limitation is valid without reference to the validity of the subsequent limitation. But no limitation can be made directly to the survivor of a number of unborn persons. If the interest given to an unborn person does not vest when such unborn person attains 21, the gift is bad, *Palmer v. Holford*, 4 Russ. 403. (Halsbury Vol. 22, page 335, paragraph 391). Under this section and section 13 of the Transfer of Property Act no limited interest can be given to an unborn person whether the vesting is within the perpetuity period or not.

Hindu Law.—According to the decision in *Tagore v. Tagore*, 9 B. L. R. 377 a Hindu cannot make a gift to a person who is not in existence at the date of the gift. Sec. 113 contemplates a power of disposition extending further in time than the Hindu Law allows (see West and Buhler, 3rd Edn. 224), *Sri Raja Venkata v. Sri Rajah Suraneni Venkata*, 31 Mad. 310. According to Hindu Law a gift to an unborn person whether of the whole interest or of a limited interest is altogether void. A person capable of taking under a will must either in fact or in contemplation of law be in existence at the death of the testator (*Tagore* case) and this holds good as to the wills of Hindus governed or not governed by the Hindu Wills Act, *Alangamonjori v. Sonamoni*, 8 Cal. 637. To cure this defect of Hindu Law, The Hindu Disposition of Property Act 15 of 1916 brings the law in conformity with the Succession Act as regards bequests to unborn persons.

Act XV of 1916.—The Hindu Disposition of Property Act applies to the whole of British India except the Province of Madras. It is not repealed by this Act. The Act is given in the appendix. The limitations laid down by this Act as regards bequest to unborn persons are those contained in sec. 113 and 114.

As regards Madras Presidency the Hindu Transfers and Bequests Act I of 1914 and the Hindu Transfers and Bequests Act VIII of 1921 are enacted (see Appendix). The limitations therein laid down are the same as in sec. 114. In spite of these Acts in the latest Madras case of *Soundararajan v. Natarajan*, 44 Mad. 446, it was held that the rule of Hindu Law that the gifts and bequests in favour of unborn persons are invalid and that the Madras Act I of 1914 which validates such gift was *ultra vires*.

Complicated questions of construction arise in case of bequests by Hindus of portions of family house for residence to a member and his family, the family including persons unborn at the testator's death. On this subject, see *Krishnanath v. Atmaram*, 15 Bom. 543; *Balabhai v. Motabhai*, 27 Bom. L. R. 906 and *Putlibai v. Sorabji*, 25 Bom. L. R. 1099 (P. C.).

Mahomedan Law.—A gift to an unborn person according to Mahomedan Law is void, *Mahomed Shah v. Official Trustee*, 36 Cal. 431.

114. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

Rule against perpetuity.

Illustrations.

(i) A fund is bequeathed to A for his life and after his death to B for his life; and after B's death to such of the sons of B as shall first attain the age of 25. A and B survive the testator. Here the son of B who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B; and the vesting of the fund may thus be delayed beyond the lifetime of A and B and the minority of the sons of B. The bequest after B's death is void.

(ii) A fund is bequeathed to A for his life, and after his death to B for his life, and after B's death to such of B's sons as shall first attain the age of 25. B dies in the lifetime of the testator, leaving one or more sons. In this case the sons of B are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

(iii) A fund is bequeathed to A for his life, and after his death to B for his life, with a direction that after B's death it shall be divided amongst such of B's children as shall attain the age of 18, but that, if no child of B shall attain that age, the fund shall go to C. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of B, a person living at the testator's decease. All the bequests are valid.

(iv) A fund is bequeathed to trustees for the benefit of the testator's daughters, with a direction that, if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughters whose share it was. All these provisions are valid.

(This is sec. 101 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act, with this addition that the words "son," "sons," "child," and "children" shall be deemed to include an adopted child and the word "grandchildren" shall be deemed to include the children whether adopted or natural born of a child whether adopted or natural born and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son. See Schedule iii. Cl. 5).

COMMENTARY.**Rule Against Perpetuity.**

Definition.—Perpetuity has been defined as the creation of "an inalienable and indestructible interest"; in its secondary or artificial sense it denotes "an interest which will not vest till a remote period."

Perpetuity according to English Law.—After the recognition of future estates in English law and the limitations of estates in remainder to unborn children it was felt that unless some rules restraining the creation of such estates were devised, property may be tied up in perpetuity and the due bounds were settled by successive decisions. At first such future estates were allowed to take effect within the compass of an existing life, *Duke of Norfolk's case*, (1681) 3 Ch. Cas. 1, then within a reasonable time afterwards. Next any number of existing lives was allowed to be taken, and finally the reasonable time was settled as twenty-one years (eighteen in India) after the duration of existing lives, with the possible addition of the period of gestation actually existing. The rule has been enacted for the free and active circulation of property, both for the purposes of commerce and the improvement of land.

This rule is ordinarily known as the rule against perpetuity. The rule is one of public policy.

The modern English rule against perpetuities is stated in Gray on Perpetuities, 3rd Edn., at p. 174 as follows:—

Rule 1.—"No interest is good unless it must vest if at all not later than twenty-one years after some life in being at the creation of the interest." In other words the period fixed is a life or lives in being and twenty-one years with the addition of the period of gestation in case where gestation actually exists, *Cadell v. Palmer*, (1833) 1 Cl. and Fin. 372 H. L. If the vesting is delayed beyond then the rule applies and the gift is void. Therefore the rule lays down two essentials, *firstly* that the limitation must necessarily take effect if it takes effect within the prescribed period, and *secondly* if at the time of its creation the limitation is so framed as not *ex-necessitate* to take effect within the prescribed period, that is, if the limitation is bad in its inception, it will not become valid by reason of the happening of subsequent events which bring the time of its actual vesting and taking effect within the prescribed period, *e. g.*, if land is devised to A for life and after his death to the eldest son of B, on his attaining 24 the limitation to the eldest son of B is void in its inception and even if at the death of A, B has a son who has already attained 24 or may attain 24 within 21 years of A's death it will not make the limitation valid.

As regards the life or lives in being the vesting may be postponed for any number of lives provided they are all in being when the interest is created and it is not necessary that these persons should take any interest. To take an extreme case a testator may validly postpone the vesting till the lives of all persons now living in the world. A typical case of this kind occurred in *Thellusson v. Woodford*, 11 Ves. 112 in which the vesting was postponed by the testator during the lives of all his children, grandchildren and great-grandchildren, who were living at the time of his death, for the benefit of some future descendants, thus strictly keeping within the rule. In practice, however, the test that is applied in such a case is whether the devise will or will not tend to a perpetuity by rendering it almost if not quite impracticable to ascertain the extinction of the lives described and will be avoided or supported accordingly.

The additional period of twenty-one years allowed by the English rule is the period of 21 years in gross without reference to the infancy of any person as under sec. 114. It may be denoted by the minority of any person who may be the person in whom the interest is to vest or may be any other person whether taking an interest or not. Thus under the English rule vesting may take place when the unborn child of a living person attains majority, *Packer v. Scott*, (1864) 33 Beav. 511; and the period prescribed by a will may extend until the youngest grandchild of the testator attains twenty-one, *Shaw v. Rhodes*, (1836) 1 My and Cr. 135. (Halsbury's Laws of England, Vol. 22, p. 309, paragraph 649). Under sec. 114 this obviously cannot be done, as the person who is to take the ultimate remainder must be the person at the expiration of whose minority the ultimate remainder is to vest.

The period from which time begins to run is when the limitations are created, *i. e.*, in the case of deeds from their dates and in case of wills Calculation of period. from the death of the testators. If the limitation begins within the perpetuity period it is not necessary that it should terminate within the same limits.

The rule does not apply to vested remainders. It applies to contingent remainders, both legal and equitable and to executory devises.

Its application. A remainder is said to be vested when it is ready to take effect on the determination of the prior estate, *e. g.*, if a devise

is made to A for life and after his death to B. B has a vested remainder ready to take effect on the death of A and if B dies in A's lifetime his legal representatives will take (see ill. *iii.*). Obviously the rule against perpetuity cannot have any application to a devise of this kind for there is no postponement. If, however, a devise is made to A for life with remainder to such son of B as shall first attain 21 the limitation to the son of B is a contingent remainder and is valid as the period is not exceeded. But if a devise be made to A a bachelor for life and after his death to his first son for life and after the son's death to A's eldest daughter who shall then be living; the contingent remainder to A's eldest daughter living at his son's death is void because it could not vest till the son's death which might occur more than twenty-one years after the death of A. An executory devise is a future interest which is indestructible and unlike contingent remainder it does not depend upon the termination of any prior interest. Executory interests created by will are called executory devises, *e. g.*, a man by his will devises his land to his son A an infant and his heirs but in case A should die under 21 then to B and his heirs. Here A has an estate in fee subject to an executory interest in favour of B. If A does not die under age B takes nothing but if A dies under age B's estate immediately arises and displaces the estate of A and his heirs. A contingent remainder may become an executory devise, *e. g.*, taking the illustration already quoted if a devise is made to A for life then to the son of B as shall first attain 21, if A survives the testator the limitation to the son of B is a contingent remainder but if A dies in the lifetime of the testator the interest to B's son is an executory devise. In both these cases, *i. e.*, in the case of a contingent remainder or an executory devise if the vesting is delayed beyond the period the gift is void (see *Thomas v. Wilberforce*, 31 Beav. 299; *Jee v. Audley*, 1 Cox. Eq. Ca. 324; *In re Ashford*, (1905) 1 Ch. 535; see also ill. to sec. 116). There are two further limitations to be observed in case of contingent remainders and they are popularly known as the rule against "Double Possibility" or "Possibility on a Possibility."

Rule II.—Rule in *Whitby v. Mitchell*, 42 Ch. D. 494. 44 Ch. D. 85.—"An estate cannot be limited in remainder after an estate given to an unborn person for life to any child of such unborn person." In other words there cannot be a limitation to successive generations of unborn issue. In the case of *Whitby v. Mitchell*, *supra*, land was devised to an unborn person for life with remainder to the children of that unborn person and it was held the limitations were void. This rule applies to contingent remainders and not to executory devises. It applies to equitable as well as legal estate, *In re Nash* (1916) 1 Ch. 1.

Rule III.—Rule in *In re Frost*, 43 Ch. D. 246. "That a contingent remainder limited to take effect after a contingent remainder is void unless it must necessarily vest within the period allowed by the rule against perpetuities." These two rules have given rise to great controversy amongst English text-writers especially in case of limitations in favour of bachelors and spinsters for the benefit of their children by subsequent marriage as will be seen from the following cases.

In re Frost, 43 Ch. D. 246. In this case a trust was for daughter (a spinster) for life, then for the husband whom she might marry for life and then for her

children whom she should appoint and in default of appointment to all her children who should be living at the death of the survivor of her and her husband or should have previously died leaving issue then living in equal shares, and in default of issue to the sons of the testator. Subsequent to the death of the testator the daughter married and died without issue. It was held that the limitations subsequent to the life estate of the daughter's husband infringed the rule of possibility on a possibility and were void for remoteness. Here it was argued with success that husband was a possibly unborn person when the testator died and it was a limitation to an unborn person for life followed by a limitation to another unborn person, *viz.*, the children. This case is followed in *Re Ashford*, (1905) 1 Ch. 535 and *Whitby v. Von Ludeck*, (1906) 1 Ch. 738.

In *Re Park's Settlement*, *Foran v. Bruce*, (1914) 1 Ch. 595. In this case freehold land was limited to a bachelor for life, then to his wife for life and then to his children. It was held that limitation was void as infringing the rule against limiting land to an unborn person for life (here the wife) with remainder to the children of such unborn person.

In *Re Bullock's will Trusts*, *Bullock v. Bullock*, (1915) 1 Ch. 493 a testator devised the rents and profits of his property to his niece B (a spinster) for life and after her to her husband for life and after the death of both to the children of B at twenty-one and in default of children to the children of S. B married but died without issue. It was held that the gift to the children of B was not void. It was argued successfully that the cases *In re Frost*, and *Park's Settlement* were wrongly decided that the limitation to the children of B was not void as children were predicated of B and not of the husband. It was further held that even if the gift in favour of the children was void the gift to the children of S was good as an alternative and severable gift.

In *Re Garnham*, *Taylor v. Baker*, (1916) 2 Ch. 413 the decisions in *Re Frost*, and *Park's Settlement* were not followed and it was held that a devise of real estate in trust for a bachelor or spinster for life with remainder for any wife or husband he or she may marry for life with remainder for his or her children is not void for perpetuity because the class of children is ascertained at the death of the first tenant for life and the interpolation of a life interest to an unascertained person cannot make any difference.

All these cases came up for discussion in the originating summons No. 5008 of 1923 and have been considered in a very lucid judgment of the Hon'ble Mr. Justice Kemp in the Bombay High Court. The judgment unfortunately has not been reported but was delivered on 19th January 1925. The case was a construction of a deed of settlement by a Parsi lady before the Transfer of Property Act and was governed by the English law. His Lordship preferred to follow the later decisions *In re Bullock's Trusts* and *In re Garnham* than the case of *Park's settlement*. Had the case been of a will governed by the Succession Act or of a deed governed by the Transfer of Property Act, sec. 113 of the former Act and sec. 13 of the latter Act would apply and it is submitted the case in *Re Park's settlement* would apply.

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power may have to be ascertained at a remote period or if the subject matter in respect of which the power is to be exercised may not come into existence within the prescribed time, *e. g.*, a power given to the unborn child of a living person is too remote, *Wollaston v. King*, (1868) L. R. 8 Eq. 165; unless it is a general power to appoint by deed. In powers the questions of remoteness are governed by three rules (1) If a power can be exercised at a time beyond the limits of the rule against perpetuities, it is bad. (2) A power which cannot be exercised beyond the limits of the rule against perpetuities is not rendered bad by the fact that within its terms an appointment could be made which would be too remote, *i. e.*, if the exercise of a power is made contingent on the happening of an event which may by possibility happen beyond the limits of the rule the mere fact that the contingency has happened earlier and has rendered the exercise of the power practicable within the prescribed limit does not validate the power, *Sivashankar v. Subramania*, 31 Mad. 517. According to the decision in *Javerbai v. Kablibai*, 16 Bom. 492, in construing wills of Hindus conferring power of appointment two limitations must be observed (i) that the appointee should be a person who was alive at the death of the testator and (ii) that the appointee must be a person ascertained when the event arises on which he is to take. (3) The remoteness of an appointment depends on its distance from the creation and not from the exercise of the power. (Gray on Perpetuities, 3rd Edn., p. 397). In the case of a general power of appointment the period of calculation is from the date of the exercise of the power but in case of special powers the period is always calculated from the time of the creation of the power and the test to be applied is to put the instrument exercising the power into the instrument creating the power and to see whether the rule is infringed or not. (Halsbury, Vol. 22, p. 356, paragraph 722).

Examples.

A power given to A and his heirs to appoint to B a person living at the creation of the power is good. But a power given to A to appoint to all his grandchildren who are living twentyfive years after his death is bad. If a bequest is made to A for life with remainder as he shall by will appoint, if A was alive at the time of the creation of power the power given to him is good. But if A was not born at the time of the creation of the power the power given is too remote (Gray on Perpetuities, 3rd Edn., p. 426).

Charity.—The term "Perpetuity" when applied to charity is used in two senses. In its primary sense it is a rule which forbids creation of a permanent interest. In its secondary sense it means a grant or disposition delayed for a period longer than the life in being create an inalienable and a permanent interest. Hence charitable bequests are an exception to the rule against perpetuity only in its primary sense. But they are not so when the term perpetuity is used in its secondary sense and if that rule is infringed the gift may be void, *Jones v. Adm.-General*, 46 Cal. 485. If, however, the bequest to charity is alternative the gift is not affected, *Adv.-General v. Vithaldas*, 22 Bom. L. R. 1005.

Perpetuity under the Succession Act.—The law as laid down in sec. 114 of this Act and sec. 14 of the Transfer of Property Act is not quite the same as the English Law stated above.

Rule 1.—As regards the first rule, viz. life or lives in being and 21 years

this further modification that the person to take the ultimate remainder is not any person as under the English law but the person whose minority is spoken of.

Rule II.—That the limitation to an unborn person for life with remainder to another unborn person is bad under the English law cannot have any application in India as no gift can be made to an unborn person for life under sec. 113 of this Act and sec. 13 of the Transfer of Property Act. Under English law a bequest can be made to an unborn person for life. (Halsbury Vol. 22, p. 335). In India no life interest or any limited interest can be given to an unborn person.

The rule applies to moveable as well as immoveable property, *Cawasji N. Pochkhanawalla v. R. D. Setna*, 20 Bom. 511.

Perpetuity according to Hindu Law.—Under the Hindu Wills Act sec. 100 & 101 have been made applicable to Hindu Wills. But sec. 3 expressly excludes any disposition contrary to Hindu Law. "Nothing contained" in that Act "shall authorize any Hindu.....to create in perpetuity any interest which he could not have created before 1st September 1870," *Alangamonjori v. Sonamoni*, 8 Cal. 637. In *Dekshayani v. Amrita*, 23 C. W. N. 826 it was held that this rule did not apply to Hindu Wills. The Hindu Law as regards creation of future estates is circumscribed by greater restrictions. A Hindu cannot make a bequest to an unborn person (*Tagore Case*). A Hindu cannot by a will institute a course of succession unknown to the Hindu Law, e. g., by giving male heirs to the exclusion of female heirs, *Shookmoy v. Monohari*, 7 Cal. 269 in appeal 11 Cal. 684 (P. C.), 12 I. A. 103; *Tarakeswar v. Shoshi*, 13 C. H. C. R. 62 (P. C.); 9 Cal. 952; *Purna Shashi v. Kalidhan*, 38 Cal. 603 (P. C.) and in conferring successive estates the rule is that an estate of inheritance must be such as is known to Hindu Law which for example an estate tail is not. It is also competent to a Hindu testator to provide for the defeasance of a prior absolute estate contingently upon the happening of a future event; but the event must be one that will happen, if at all, immediately on the close of a life in being at the death of the testator or at the time of the gift (as decided in *Mullick's case*, 6 M. I. A. 526), and the gift over must be in favour of some person in existence at the death of the testator as laid down in *Tagore case*; the latter case decided not only that a gift to an unborn person is invalid but that an attempt to establish a new rule of inheritance is invalid. If the contingency is such that the estate is to be held in abeyance the gift will be void. See *Gordhandas Soonderdas v. Ramcoover*, (Mulji Jaitha trust case) 26 Bom. 449, where the trust was until the youngest of the grandsons of the settler attained the age of 21 years and there was no disposition of the income or corpus till then and the trust was held to be inoperative. But a settlement by way of remainder to take effect on the happening of an event following immediately on the close of a life in being is good, *Ranganadha v. Baghirathi*, 29 Mad. 412. If the intention of the testator is not to dispose of the estate but to make a gift of the rents and profits and to limit the enjoyment thereof for an indefinite period that is clear indication to create a perpetuity and the gift is invalid, *Sookhmoy Chunder v. Srimati Monohurri*, 12 I. A. 103. (See Mulla's Hindu Law, 4th Edn., p. 367). The Hindu Disposition of Property Act XV of 1916 and The Hindu Transfers and Bequests Act I of 1914 (Madras) and VIII of 1921 (Madras) bring the law in conformity with the sec. 114. In *Muthuswami v. Kalyani*, 40 Mad. 818 it was held that Act I of 1914 (Madras) was retrospective in its effects.

In the latest Madras case, however, of *Soundararajan v. Natararajan*, 44 Mad. 446; it was held that the Madras Act I of 1914 in so far as it purported to affect the law administered on the original side of the Madras High Court was *ultra vires* of the legislative powers of the provincial Legislative Council and the bequests to unborn persons was void. This case is fully quoted in the commentary under sec. 126 *supra*.

Examples.

(1) A testator directed his executors to divide his residuary estate "when my grandsons may attain their age into five shares (he having five sons) and give away the same to their respective sons that is to say to my grandsons." *Held*: that the distribution was to take place only after all the sons who might be born to the sons should have attained majority and was invalid under the old sec 101 and 102, *Subramania v. P. V. Murugesu*, 17 C. W. N. 488 (P. C.).

(2) A testator devised his Zamindari "to my eldest son and to his lawful male children and in the event of my eldest son dying without lawful male children to my next male heir and should all my sons die without lawful male children to my female children." The testator died leaving three sons and four daughters. The eldest son died without having lawful male children. *Held*: that the eldest son took only a life interest, *Richard R. Skinner v. Naunihal Singh*, 40 I. A. 105.

(3) A testator gave the residue of his estate on trust "to pay and divide the same among the children of my brothers A and B to be divided among them in the proportion of two parts to sons and one part to daughter and that the share of each son shall be paid to him on his attaining 21 and of each daughter on her attaining that age or marrying previously with benefit of survivorship." A and B both died before the eldest of the son or daughter attained 21 or married. Widow filed the suit for a declaration that the trusts were void under sec. 114 and 115. *Held*: that the legatees took a vested interest subject to be divested on death before the contingency happened, that the period of distribution alone and not the vesting was postponed and the bequests were valid, *Maseyk v. Fergusson*, 4 Cal 670.

(4) A testator bequeathed to the three sons of his brother his property in the following words. "The said three nephews shall hold possession of the above in equal shares..... They shall have no right to alienate the same by gift or sale but they, their sons, grandsons and their descendants in the male line shall enjoy the same. If any die without leaving a male child his share shall devolve on the surviving nephews and their male descendants and not on the other heirs." *Held*: that the attempt to alter the legal course of inheritance failed and the nephews took a life interest. The gift over was good and on the death of one brother his share went to the surviving brothers, *Tarokessur v. Soshi*, 9 Cal. 952.

(5) A testator bequeathed the residue of his estate upon trust to pay the income to

daughter claimed the moiety as the trusts were void. Of the children of the half-brothers all were born after the testator's death, save three sons. *Held*: that the gift to half-brothers and the heir males of their bodies was void, that each of the half brothers took an estate for life in the moiety of the residue in remainder expectant on the death of the daughter and that on the death of the half-brother his moiety devolved on the daughter as the heir of her father, *Kristoromoni v. Navendro*, 16 Cal. 383 (P. C.).

(6) A Hindu by his will directed his executors on failure of sons and after the death of his wife "to divide the whole of my property between my daughters in equal shares to whom and their respective sons I give, devise and bequeath the same, but should either of my daughters die without leaving any male issue surviving but leaving my other daughters surviving then and in such case the surviving daughter and her sons shall be entitled to the

share of the deceased daughter or in case of the death of either daughter leaving sons the share of such daughter is to be paid to such her son or sons share and share alike." The testator left no sons. After the death of the widow one of the daughters filed a suit for construction. *Held* daughters took an estate for life, *Radha Prasad v. Ranee Mani*, 35 Cal. 896 (P.C.). Subsequently one of the daughters died leaving five sons, and they claimed their mother's share. Three of the sons were born in the lifetime of the testator and two subsequently. *Held* that the three sons took, to the exclusion of the two after born sons, *Radha Prasad v. Rani Moni*, 38, Cal. 189; confirmed in appeal 41 Cal. 1007, 41 I. A. 176.

(7) A Hindu bequeathed his property to his youngest son for life and after his death to his sons equally. If no son then to any son whom his wife might adopt on that adopted son attaining 21 absolutely. *Held*. bequest in favour of a son who might be adopted by the widow was void under the old sec. 101, *Kashinath v. Chimnaji*, 30 Bom. 477.

(8) A Hindu by a deed of settlement executed in 1889 settled certain property on trust to pay one-fourth of the income to his son R for life and after his death to "all the male heirs" of R share and share alike and made a similar provision in favour of his daughter K and "her male heirs". The settlor died in 1894; K died in 1897 and R in 1908 leaving respectively six and five sons who were in existence at the date of the settlement. The two sons of R filed a suit for construction. *Held* that the settlement in favour of R and K and "their male heirs" was void as excluding the legal course of inheritance and it was also void because the settlor had intended to create a perpetuity, *Balabhai v. Motabhai*, 27 Bom. L. R. 906. (This decision is under appeal to Privy Council)

(9) M, a Hindu, by his will bequeathed certain property to J for life and after J's death to his male issue and in default of such male issue, then to such person or persons as J might by any deed or will appoint. J has no male issue and he appointed the property to his two daughters—Kabli and Moti Kabli was born in M's lifetime; Moti was born after his death. Kabli will take a moiety of the property. Moti will take nothing and the share appointed to her will form part of M's estate of which he died intestate and will belong to his heirs, *Javerbai v. Kablibai*, 16 Bom. 492; *Motivahoo v. Mamobai*, 24 I. A. 93; *Raghunji v. Narandas*, 8 Bom. L. R. 921.

(10) The members of the family of Framji C. Banaji entered into an agreement to divide the income of the Powai Estate amongst the various heirs of the deceased, Framji being parties to the agreement and it was further provided that "after the death their (*viz.*, the signatories) shares are to be enjoyed and received by their heirs and children from generation to generation." It was decided that under the agreement the signatories took life interest, *Mithibai v. Limji*, (5 Bom. 506, 6 Bom. 151). *Held*: that the settlement in favour of the heirs and children of the signatories was a valid settlement and was not void as creating a perpetuity and the heirs and children took absolutely. A gift to the heirs of A from generation to generation confers on them when ascertained the same estate as if the gift were to X and Y the heirs of A nominatim, *Fardunji Banaji v. Mithibai*, 22 Bom. 355.

(11) A testator directed that his estate should remain intact providing for religious services to be kept by his family from the profits of his estate, his will being "my heirs, sons, son's sons, great-grandsons and so on in succession should be entitled to enjoy such property." *Held*: that the bequest was void, *Shookmoy Chunder v. Monohari*, 7 Cal. 269, 11 Cal. 634 (P. C.).

Bequest to a class
some of whom may
come under rules in
sections 113 and 114

115. If a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the provisions of section 113 or section 114, such bequest shall be wholly void.

Illustrations

(1) A fund is bequeathed to A for life, and after his death to all his children who shall attain the age of 25. A survives the testator, and has some children living at the

testator's death. Each child of A's living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. But A may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of A. The bequest to A's children, therefore, is inoperative as to any child born after the testator's death; and, as it is given to all his children as a class it is not good as to any division of that class, but is wholly void.

(ii) A fund is bequeathed to A for his life, and after his death to B, C, D and all other children of A who shall attain the age of 25. B, C, D are children of A living at the testator's decease. In all other respects the case is the same as that supposed in *Illustration (i)*. The mention of B, C, and D by name does not prevent the bequest from being regarded as a bequest to a class, and the bequest is wholly void.

(This is sec. 103 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act, with this addition that the words "son," "sons," "child," and "children" shall be deemed to include an adopted child and the word "grandchildren" shall be deemed to include the children whether adopted or natural-born of a child whether adopted or natural-born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son. See Schedule III., Cl. 5).

COMMENTARY.

Leake v. Robinson (1817) 2 Mer. 363. This section is enacted on the principle of the decision given in this case in which the bequest was to A for life and after his decease to the children of A who being a son should attain the age of 25 or being a daughter attained that age or married with consent and in default to the brothers and sisters of A upon their attaining twenty-five or marriages respectively. Five of the brothers and sisters of A were born before the testator's death and it was contended that the bequest though void as to those after born was good as to them; but it was held that the bequest failed in its entirety. "The bequests in question are not made to individuals but to classes and what I have to determine is whether the class can take. I must make a new will for the testator if I split into portions his general bequest to the class and say that because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests what he never intended them to be namely a series of particular legacies to particular individuals." *Illustration (i)* is adopted from this decision. *Illustration (ii)* is in all respects the same except that names of some individuals composing the class are mentioned, (*Porter v. Fox*, 6 Sim. 485). In *Kingsbury v. Walter*, (1901) A. C. 187 the bequest was to wife for life and after her death for A and the children of B at 21. Wife survived the testator, but A died in his life-time. It was contended that the gift to A and the children of B was not a gift to a class and that as A died his share lapsed and fell into the residue. It was held that the gift was a gift to a class and the five children of B who survived the period of distribution were entitled to it.

In ascertaining whether a particular bequest is to a class or to individuals the test applied is to see whether the interests vest at one and the same time. Words indicative of "equally" or "share and share alike" would indicate a contrary intention.

When the class is composed of children and grand-children, e.g., a bequest to the children of A who attain 21 and the children of those who die when they attain 21 the rule is infringed as the grand-children would take their parent's share; for the minimum number of shares cannot be determined till the grand-

children have attained 21 and this may happen beyond the limits prescribed by the rule, *e.g.*, if one child of A is under age at the death of A and dies a minor leaving an infant that infant will not attain majority till more than 21 years after A's death and the whole bequest is void, *Hale v. Hale*, (1876) 3 Ch. D. 643. In *Pearks v. Moseley*, (1880) 5 App. C. 714 a bequest was to the children of A, who shall attain 21 and the issue of such of them as died under that age leaving issue who shall attain 21 or die under that age leaving issue, the last mentioned issue to take *per stirpes* the share of their parent. It was held that the entire bequest was void for remoteness. In *Greenwood v. Roberts*, 15 Beav. 192, a bequest was to A for life and on his death to such of his children as might be living in equal shares for their lives and on the death of any child his share was to be divided among his children when they came of age. It was held that the gift was to a class composed of children and grand-children and was void. See also *Stuart v. Cockerell*, 7 Eq. Cas. 363.

If however, there is an independent gift to a class followed by a substitutionary clause which latter alone is affected by the vice of remoteness the original gift is held to be good and the substitution bad. In *Goodier v. Johnson*, (1881) 18 Ch. D. 441; a bequest was made to the children of the testator's unmarried son and daughter and the issue of such of the children as should die before the son, daughter and the son's future wife. The gift over to the issue was bad as it was to take effect after the death of the son's widow who might not have been born in the testator's lifetime but the gift to the issue was considered to be substitutionary and it was held that the gift to the children was good. See also *Courtier v. Oram*, 21 Beav. 91; *Webster v. Boddington*, 26 Beav. 128; *Lanphier v. Buck*, 34 L. J. Ch. 650.

The principle deducible from these cases is that where there is a gift to a class any member of which may have to be ascertained beyond the limits of perpetuity or if the total amount to be taken by any member of the class cannot be ascertained within the period the whole gift is void, (*Bentinck v. Duke of Portland*, 7 Ch. D. 693) except where a part of this gift is by way of substitution in which case the original gift may be separated and the substituted gift only declared void. There is also to be noted the distinction between a gift of a fund to a class and the gift of a sum to each member of a class, the latter gift will be good as to those who are within the limits of perpetuity, (*Storrs v. Benbow*, 3 De. G. M. and G. 390).

Hindu Law.—This section is applied to the wills of Hindus governed by the Hindu Wills Act; but the decision in *Leake v. Robinson* has not been applied strictly in construing the wills of Hindus. The earliest case is *Soudaminy v. Jogesh Chunder Dutt*, 2 Cal. 262 in which *Leake v. Robinson* was followed. But in *Rai Bishen Chand v. Mussumat Asmaida Koer*, 11 I. A. 164, it was not followed; there the gift was to the children of U, some of whom were born at the date of the gift and others not; and their Lordships of the Privy Council held that those who were in existence at the date of the gift took. In *Ram Lal v. Kanai Lal*, 12 Cal. 663 the above Privy Council case was followed where it was held that if the intention of the donor is to give a gift to two named persons capable of taking although it is also his intention that other persons unborn at the date of the gift should afterwards come in and share therein, the part of the gift which is capable of taking effect should be given effect to notwithstanding that the intention of the donor cannot be carried out in its entirety. See also *Krishnanath v. Atmaram*, 15 Bom. 543.

In *Mangaldas v. Tribhuvandas*, 15 Bom. 652, P a Hindu died and left two sons Mangaldas and Manmohundas. By his will he bequeathed the residue to the wife of Manmohandas for life and then to Manmohundas for life and after their death "to the sons and daughters" of Manmohundas. At the time of the testator's death the wife and one daughter Chandakuvar of Manmohundas were living. Subsequently a son was born to Manmohundas but died shortly after its birth. After the death of Manmohundas and his wife, Mangaldas filed a suit claiming the property as the heir of the testator to the exclusion of Chandakuvar contending that she could only claim as one of the class of "sons or daughters" of Manmohundas, and the gift was void as it included or might include persons who were not in existence at the time of the testator's death. *Held*: Chandakuvar was entitled to the property. The primary intention was that all the members of the class should take and the secondary intention was that if all could not take, those who could, should do so and the secondary intention must be given effect to. See also *Tribhuvandas v. Gangadas*, 18 Bom 7; *Gordhandas v. Ramcoover*, 26 Bom. 449. In *Khimji v. Morarji*, 22 Bom. 533 a testator gave his property to be distributed after the death of the last surviving of his five sons among the sons of his sons and daughters of his sons and provision was made for the widows of his deceased sons. He left surviving three grand-sons and three grand-daughters. After his death two more grand-daughters were born. It was held that gift was to a class and was void. See also *Sivasankara v. Soobramania*, 31 Mad. 517; *Soundararajan v. Natarajan*, 44 Mad. 446; *Soudaminy v. Jogesh Chunder*, 2 Cal. 262; *Kherodemoney v. Doorgamoney*, 4 Cal. 455. In *Bhagabati v. Kalicharan*, 32 Cal. 992 in appeal 38 Cal. 468, (P. C.), 38 L. A. 54, a Hindu after giving his wife and his mother a certain property provided "on the death of my mother and my wife the sons of my sister who are now in existence as also those who may be born hereafter shall in equal shares hold the said property and enjoy the rights of inheritance." It was held that the intention of the testator was that all his nephews whether in existence or not should take, but that his further intention was that if some could not take the others should take and that it was a valid bequest as to those who were in existence at the testator's death; *Ram Lal v. Kanas Lal* was approved and the principle in *Dias v. De Livera*, (1879) 5 App. C. 123 followed.

The principle deducible from these cases is to ascertain the intention of the testator and that if the court comes to the conclusion that the testator had the primary intention of benefitting all the members of a class and if such intention fails by reason of its being void, yet if the court can deduce a secondary intention that at least such members of the class should take as were in existence at the time of the testator's death then effect should be given to such secondary intention but not otherwise. For the purpose of ascertaining such primary and secondary intention it is of course necessary to take all the material facts as to the testator's family into consideration and to read the various provisions of his will as a whole. (*Khimji v. Morarji*, *supra*).

Bequest to take effect
on failure of bequest
void under section 113,
114 or 115

116. Where a bequest is void by reason of any of provisions of section 113, section 114, or section 115, any bequest contained in the same will, and intended to take effect after or upon failure of such prior bequest, is also void.

Illustrations.

(i) A fund is bequeathed to A for his life, and after his death to such of his sons as shall first attain the age of 25, for his life, and after the decease of such son to B. A and B survive the testator. The bequest to B is intended to take effect after the bequest to such of the sons of A as shall first attain the age of 25, which bequest is void under section 114. The bequest to B is void.

(ii) A fund is bequeathed to A for his life, and after his death to such of his sons as shall first attain the age of 25, and, if no son of A shall attain that age, to B. A and B survive the testator. The bequest to B is intended to take effect upon failure of the bequest to such of A's sons as shall first attain the age of 25, which bequest is void under section 114. The bequest to B is void.

(This is *sec. 103 of the Succession Act X of 1865*. It applies to Hindus within the territories mentioned in *sec. 57, &c.*, to Hindus formerly governed by the Hindu Wills Act, with this addition that the words "son" "sons" "child" and "children" shall be deemed to include an adopted child, and the word "grand-children" shall be deemed to include the children whether adopted or natural-born of a child whether adopted or natural-born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son. See *Schedule, III., Cl. 5*)

COMMENTARY.

This section incorporates the rule of English law, *viz.*, that "limitations upon void limitations are themselves void," the transaction being one and indivisible the failure of the prior bequest for any of the rules against perpetuities leads to the failure of the whole of the subsequent limitation. This rule applies although the subsequent limitation is to a person *in esse*. In order, however, to make the subsequent bequest void on the failure of an antecedent bequest under this section the essential requisite is that both the bequests must be created by the *same transaction*, *e. g.*, a fund is bequeathed to A for life and after his death to such of his sons as shall first attain the age of 25 and, if no son of A shall attain that age, to B. A and B survive the testator. The bequest to A for life is valid but the bequest to the sons of A is void (*sec. 114*) and therefore also the bequest to B is void. The result is that after A's life interest the fund will fall into the residue, and if it is a part of the residue itself, it will go as undisposed of.

This section lays down the effect on *subsequent* limitations and not *prior* limitation. The prior limitation is not affected, and it will take effect as if the void limitation and all limitations depend upon it were omitted. If a gift over is void the limitation prior to it and made defeasible by it becomes free and may become indefeasible. (*Halsbury's Laws of England*, Vol. 22, page 350, paragraphs 709-712).

117. A direction to accumulate the income arising from any property shall be void; and the property shall be disposed of as if no accumulation had been directed.

Effect of direction
for accumulation

Exception.—Where the property is immoveable, or where accumulation is directed to be made from the death of the testator, the direction shall be valid in respect only of the income arising from the property within one year next following the testator's death; and at the end of the year such property and income shall be

disposed of respectively, as if the period during which the accumulation has been directed to be made had elapsed.

Illustrations.

(i) The will directs that the sum of 10,000 rupees shall be invested in Government securities, and the income accumulated for 20 years, and that the principal, together with the accumulations, shall then be divided between A, B and C. A, B and C are entitled to receive the sum of 10,000 rupees at the end of a year from the testator's death.

(ii) The will directs that 10,000 rupees shall be invested, and the income accumulated until A shall marry, and shall then be paid to him. A is entitled to receive 10,000 rupees at the end of a year from the testator's death.

(iii) The will directs that the rents of the farm of Sultanpur shall be accumulated for ten years, and that the accumulation shall be then paid to the eldest son of A. At the death of the testator, A has an eldest son living, named B. B will receive, at the end of one year from the testator's death, the rents which have accrued during the year, together with any interest which may have been made by investing them.

(iv) The will directs that the rents of the farm of Sultanpur shall be accumulated for ten years, and that the accumulation shall then be paid to the eldest son of A. At the death of the testator, A has no son. The bequest is void.

(v) A bequeaths a sum of money to B, to be paid to him when he shall attain the age of 18, and directs the interest to be accumulated till he shall arrive at that age. At A's death the legacy becomes vested in B; and so much of the interest as is not required for his maintenance and education is accumulated, not by reason of the direction contained in the will, but in consequence of B's minority

(This is sec. 104 of the Succession Act X of 1865).

COMMENTARY.

The rule against accumulation is like the rule against perpetuity directed against the postponement of enjoyment. The section owes its origin to the English Statute known as the *Thellusson Act* which was occasioned by the extraordinary will of Mr. Thellusson who directed the income of his property to be accumulated during the lives of all his children, grand-children, and great-grandchildren who were living at his death for the benefit of some future descendants to be living at the decease of the survivor, thus keeping strictly within the rule against perpetuities. The *Thellusson Act* was passed to prevent the repetition of such cruel absurdity. It forbids the accumulation of income for any longer term than (1) the life of the grantor or settlor or (2) 21 years from the death of such grantor or testator or (3) during the minority of any person living or *en ventre sa mere* at the death of the grantor or testator or (4) during the minority only of any person who under the settlement or will would for the time being, if of full age, be entitled to the income directed to be accumulated. (*Williams' Real Property*, 20th Ed., p. 398). Sec. 117 is a considerable restriction upon the English law as to accumulation. It prohibits a direction for accumulation except in the following three cases only:—

Exceptions.—(1) Where the property is immoveable the accumulation shall be valid for one year after the testator's death.

(2) Where the accumulation is directed to be made from the death of the testator the direction shall be valid for one year.

(3) Where the accumulation is directed during the minority of a person to whom the bequest is to belong on attaining majority, such a direction shall be valid. (Ill. v.). This is in accordance with the fourth rule in the Thellusson Act, see *In re Cattell, Cattell v. Cattell*, (1907) 1 Ch. 567; *Jagger v. Jagger*, 25 Ch. D. 729. But if the accumulation is directed beyond the age of majority, *e. g.*, until the legatee attains the age of 30 the direction would be void, *Gosavi Shivgar v. L. W. G Rivett Carnac*, 13 Bom. 463; *Putlibai v. Sorabji*, 25 Bom. L. R. 1099 (P. C.).

Accumulation according to Hindu Law.—In Hindu Law a direction to accumulate is not *per se* illegal, *Krishnarao v. Benabai*, 20 Bom. 571; and such a direction will be given effect to if it is not void as against public policy, nor given for illegal object nor otherwise inconsistent with Hindu Law, *Rajendra v. Raj Coomari*, 34 Cal. 5. But in order to support a direction to accumulate under Hindu Law there must be a present gift of the property, *Amrito v. Surnomoye*, 24 Cal. 589; in appeal 25 Cal. 662. In Amrita's case it was held that if there was no beneficial interest created in the property a mere direction to accumulate for an indefinite period is not legal. This case went in appeal to the Privy Council but on another point (27 I. A. 128). See also *Benode Behari v. Nistarini*, 33 Cal. 180 (P. C.). In *Nafar Chandra v. Ratan Mala*, 15 C. W. N. 66 a testator directed his executor to accumulate the income for the marriage expenses of an unmarried son and to give the property to the wife of the son if he married within ten years and failing that to sell the property and apply the sale proceeds for certain religious purposes. The son married within ten years a lady born before the testator's death. *Held*: that the direction to accumulate was valid. In *Jamnabai v. Dharsey*, 4 Bom. L. R. 893 it was held that a direction by a Hindu in his will to accumulate the income till the boy to be adopted attained the age of 16 years is not a direction to accumulate it for ever and could not be treated as infringing the law as to perpetuities.

In *Ram Lal v. Bidhumukhi*, 47 Cal. 76 R by his will gave his property to his widow for life and thereafter to his five sons in equal shares with a direction to accumulate the surplus income during the lifetime of the widow for the benefit of the sons. It was held that the provision for accumulation was not bad. (See *Watkins v. Administrator-General*, 47 Cal. 88). But a direction to accumulate for the purpose of postponing the payment or enjoyment of an absolute bequest is void, *Cally Nath v. Chunder Nath*, 8 Cal. 377.

118. No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his

Bequest to religious or charitable uses

death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons.

Illustrations.

A having a nephew makes a bequest by a will not executed and deposited as required:—

- for the relief of poor people;
- for the maintenance of sick soldiers;
- for the erection or support of a hospital

for the education and preferment of orphans ;
 for the support of scholars ;
 for the erection or support of a school ;
 for the building and repairs of a bridge ;
 for the making of roads ;
 for the erection or support of a church ;
 for the repairs of a church ;
 for the benefit of ministers of religion ;
 for the formation or support of a public garden.

All these bequests are void.

(This is sec 105 of the Succession Act X of 1865).

COMMENTARY.

The provisions of this section have been borrowed from the Statute of Mortmain, and though it has been held that this Statute has no application in India (*Mayor of Lyons v. East India Co.*, 1 M. I. A. 175) the principle laid down by that statute has been enacted in this section. In England before the passing of the Statute of Mortmain (9 Geo. II., C. 36) the policy was to favour gifts to charitable and religious uses. But the proneness of the people to make ill-considered dying bequests under religious influence threatened to develop into a public danger and the above Statute was accordingly passed in the year 1736 to prevent persons from making death-bed bequests.

By the Statute of Mortmain (9 Geo. II., C. 36) severe restrictions were placed on alienation of lands for charitable purposes. This Statute was repealed and replaced by the Mortmain and Charitable Uses Act, 1888, (51 and 52 Vict. C. 42) which is still in force in England. Under this Act every assurance of immoveable property for any charitable uses is void unless executed at least before two witnesses, twelve months at least before the donor's death, and enrolled in Chancery within six months before the death.

In order to validate a charitable bequest under this section the will must be at least one year old and must have been deposited with the Registrar within six months from the date of its execution, *In the Goods of Nagindas*, 3 B. H. C. 135. In the case of *Administrator-General v. Hughes*, 40 Cal. 192, the will containing the charitable bequest was deposited with the Registrar but the codicil which republished the will was not, and it was held that the will was operative.

The object of the section is to prohibit death-bed bequests to religious or charitable uses by persons having near relations except under the above conditions. Such death-bed bequests cannot be made by persons having any of the following relations :—

(1) Father, (2) Mother, (3) Son, (4) Daughter, (5) Grandfather, (6) Grandmother, (7) Grandson, (8) Granddaughter, (9) Brother, (10) Sister, (11) Nephew, (12) Niece, unless the provisions of sec. 118 are complied with. As regards widow the Madras High Court has held that under this section a widow is not a nearer relation and that a bequest to charity by a person who died two days afterwards leaving a widow was valid on the ground that this section had no application to any relationship by marriage, *Administrator-General of Madras v. Simpson*,

26 Mad. 532. Under the Succession Act, however, a bequest to the next-of-kin of the testator includes husband or wife (sec. 93), and the Bombay High Court in the O. S. No. 997 of 1917 (*Dinbai v. Pestonji*) held that the widow is included in the term "nearer relative."

What are Religious or Charitable Uses.—The religious or charitable uses are not defined under the Succession Act but the words "charitable purposes" or "charitable uses" have acquired a technical meaning and in that sense they include all the purposes within the meaning of Statute 43 Eliz. C. 4. *The University of Bombay v. The Municipal Commissioner*, 16 Bom. 217. The illustrations to section 118 mainly follow the uses laid down in Statute 43 Eliz. C. 4, where the following objects are enumerated:—Relief of aged, impotent and poor people, maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in Universities, repair of bridges, ports, havens, causeways, churches, seabanks, and highways, education and preferment of orphans, relief or maintenance of house of correction, marriages of poor maids, relief or redemption of prisoners or captives, and aid for ease of poor inhabitants in payment of certain taxes. Under the Transfer of Property Act Sec. 17, charity has been classified under four principal divisions:—(1) Advancement of religion. (2) Advancement of knowledge. (3) Advancement of commerce, health, and safety of the public. (4) Advancement of any other object beneficial to mankind. This fourfold classification of charitable trusts was adopted in the well-known case of *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 522. The characteristics of charitable trusts are indefiniteness, meritoriousness and perpetuity.

(1) Advancement of Religion and Superstitious Uses.—Religious trusts are for the support, propagation or advancement of religion and gifts for religious purposes are *prima facie* gifts for charitable purposes, *White v. White*, (1893) 2 Ch. 41. As there is nothing like state religion in India all gifts will be upheld as good charitable bequests if the gift is for a religious purpose and that purpose contains elements of charity and is not of a superstitious nature. With regard to bequests for religious purposes but which are in reality for the spiritual welfare of the donor or of other members of his family and contain no practical or tangible benefit to the public and possess no public element, the tendency of the English Courts is to regard such bequests as merely superstitious and therefore not valid, *e. g.*, a bequest for the purpose of saying masses or requiems for the souls of the dead, *West v. Shuttleworth*, 2 My. and K. 684. In India although neither the English law as to superstitious uses nor the Statute of Mortmain is in force (*Mayor of Lyons v. East India Co.*, 1 Moo. I. A. 175; *Adv.-General v. Vishvanath*, 1 B. H. C. R. ix appendix) the same course is followed, and if the bequest contains no element of public utility, *e. g.*, a bequest to repair a private tomb or to establish a private museum, the bequests will be held void, *Administrator-General v. Hughes*, 40 Cal. 192. However, a bequest for the performance of masses has been held valid in India, *Andrew v. Joakim*, 3 B. L. R. 148 (O. C.). In *Colgan v. Administrator-General*, 15 Mad. 424 a bequest for masses was held to be void. Following these principles and applying them to Parsis, trusts for the performance of "*Baj Rojgar*" ceremonies and "*Siav*" and for "*Muktad*" ceremonies were held to be void. See *Limji N. Banaji v. Bapuji*, 11 Bom. 441; *Cawasji N. Pochkanavalla v. R. D. Setna*, 20 Bom. 511. But in *Jamshedji C. Tarachand v. Soonabai*, 33 Bom. 122 Mr. Justice Davar declined to follow these decisions and upheld a trust for the

performance of "*Muklad*" ceremonies. Similarly in *Haji Abdul v. Haji Hamid*, 5 Bom. L. R. 1010, a bequest by a Cutchi Memon for the anniversary ceremonies of himself and his wife and parents for "*Maulad Sheriff*" and for "*Agirai Pir*" was held to be good; see also *Salebhai v. Bai Safiabai*, 36 Bom. 111; see also *Muthukana v. Vada Levvai*, 34 Mad. 12. In *Rojomoyee v. Troylukho*, 29 Cal. 260, however, a gift for the daily worship of the family Thakoor was held to be invalid.

In the earlier cases a gift by a Hindu to an idol not in existence at the time the gift took effect was held to be invalid, *Upendra v. Hem Chandra*, 25 Cal. 405; *Rojomoyee v. Troylukho*, *supra*; *Nogendra v. Benoy*, 30 Cal. 521. These cases, however, have been overruled by the Calcutta Full Bench case of *Bhupati Nath v. Ram Lal*, 37 Cal. 128; where it was held that the principle of Hindu Law which invalidates a gift other than to a sentient being capable of accepting it does not apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death, nor does it make such a bequest void. It is immaterial that the image of the deity has not been established before the death of the testator or is periodically set up and destroyed in the course of the year. See also *Bhuggobutty v. Gooroo Prosonno*, 25 Cal. 112; *Jogadendra v. Hemanta*, 32 Cal. 129 (P. C.). The shebait is the person to take the gift, *Kal Krishna v. Akhan Lal*, 50 Cal. 233. Sometimes a gift in favour of an idol is limited to a certain sum and the balance of the income is directed to be employed for the benefit of the testator's family and the questions arise as to how far such a gift is valid. For the construction of such bequests the rule propounded is to create a charge for the necessary income for the performance of the ceremonies pertaining to the idol in favour of the idol and to give the residue to the heirs, *Sonatun Bysack v. Sreemutty* 8 Moo. I. A. 66; *Ashutosh v. Doorga Churn*, 5 Cal. 438. Their Lordships of the Privy Council in *Pande Har Narayan v. Surja Kunwari*, 48 I. A. 143, 43 All. 291 (P. C.) laid down that in determining whether the will of a Hindu gives the testator's estate to an idol subject to a charge in favour of the heirs or makes the gift to the idol a charge upon the estate, the question depends upon the construction of the will as a whole; that although the will provides that the property "shall be considered to be the property" of the idol still if the residue is to be used by the heirs after defraying the expenses of the ceremonies and if these ceremonies are indicated by the testator and would absorb only a small portion of the income that would indicate that the heirs should take the property subject to the charge for the performance of the religious purposes. See also *Gopal Lal Sett v. Purna Chandra*, 49 I. A. 100.

In several cases religious and charitable purposes are mixed up with other purposes, *e. g.*, "charitable and benevolent" or "charitable and philanthropic" and questions arise how far such gifts are valid. In *Chadunbai v. Dady*, 26 Bom. 632 a trust was to expend the income upon some one or more charitable educational or philanthropic institutions calculated to promote the public good and the bequest was held to be void. In the case of *Smith v. Massey*, 30 Bom. 500 the bequest was to expend the residue "in such charities as the trustees may think deserving" and the bequest was held to be good. In *Trikumdas v. Haridas*, 31 Bom. 583 the testator directed his executors to expend the residue as they thought proper "for the purposes of popular usefulness or for the purposes of charity" and it was held to be bad. The test to be applied is that where the description of the bequest would include purposes which might or might not be charitable and a discretion is vested in the trustees the gift is bad, *Morice v. Bishop of Durham*, *supra*; but if the gift is wholly charitable, effect will be given to it. See *Blair v. Duncan*, (1902) A. C. 37; *Grimond v.*

Grimond, (1905) A. C. 124; *In re Da Costa, Clarke v. Church of England Collegiate School*, (1912) 1 Ch. 337; *Dunne v. Byrne*, (1912) A. C. 407. See sec. 89 on Uncertainty ante p. 91; *Adv.-General v. Hormusji*, 29 Bom. 375; *Parbati v. Ram Barun*, 31 Cal. 895.

In *Dwarkanath Bysack v. Burroda Persaud*, 4 Cal. 443; a bequest was made to charity and to needy and poor and the executors were directed to spend a suitable sum for the charitable objects specified in the will and there was a residuary clause. It was held that the amount to be spent for the charitable objects would be ascertained by a reference to the mode in which the testator carried out the same in his lifetime and the gift was good. See also *Gokool Nath v. Issur Lochun*, 14 Cal. 222, and *Morarji v. Nenbai*, 17 Bom. 351.

The following are held to be good charitable gifts:—a gift to keep a choultry in repair, *Gulam Husain v. Aji*, 4 M. H. C. R. 44; for the maintenance of Anna Chatra, *Adv.-General v. Strangman*, 6 Bom. L. R. 56; a gift of money for building a well and an avada, *Jamnabai v. Khimji*, 14 Bom. 1; for Sadavarat, *Morarji v. Nenbai*, 17 Bom. 351, for performance of ceremonies and giving feast to Brahmins, *Lakshmi Shanker v. Vajinath*, 6 Bom. 25; *Kedarnath v. Atul Krishna*, 12 C. W. N. 1083; to establish a Thakoor, *Rojomoyee v. Traylukho*, 29 Cal. 260; (see *contra*, *Phundan Lal v. Arya*, 33 All. 793); for feeding poor and indigent Hindus, *Rajendra v. Roj Coomari*, 34 Cal. 5; for the performance of ceremonies and for "poonja," *Benode Behari v. Nistarini*, 33 Cal. 180 (P. C.); for building a temple and installing an idol, *Mohar Singh v. Het Singh*, 32 All. 337; *Bhupati Nath v. Ram Lal*, 37 Cal. 128; for building of Dharamsala and temples, *Jai Narain v. Ujagar Lal*, 27 Bom. L. R. 713 (P. C.); for "poor relations, dependants and servants," *Manorama v. Kali Charan*, 31 Cal. 166.

(2) **Advancement of Knowledge and Learning.**—Charitable bequests under this head are establishment of schools and institutions of learning which are not strictly private, endowment of scholarships and any other bequest which has the object of spread of knowledge, *University of Bombay v. The Municipal Commissioner*, 16 Bom. 217.

(3) **Advancement of Commerce, health and safety of the Public.**—These comprise bequests for hospitals, (*Fanindra v. Adm.-General*, 6 C. W. N. 321) construction of bridges, roads, etc.

(4) **Advancement of any other objects beneficial to mankind.**—These comprise bequests for promulgation of particular doctrines for the mental and moral improvement of mankind and any bequest of the nature of charity such as relief of the poor, marriage of poor girls, etc., etc.

Cy-Près Doctrine.—In cases of charitable bequests where the literal execution of the intention of the testator becomes inexpedient or impracticable owing to the uncertainty of the object, or the persons who are the objects of the bounty not being *in esse*, or the bequest being incapable of exact execution, the Court will carry out the charitable directions *cy près*, i. e., as nearly as possible to the original purpose. But the doctrine of *cy près* is only applicable where the testator has manifested a general intention of charity, *Salebhai v. Bai Safiabu*, 36 Bom. 111 *Adv.-General v. Belchambers*, 36 Cal. 261; and, therefore, if he has had but one particular object in his mind, e. g., to build a church at W, and that object cannot

(v) A bequeaths the whole of his property to B upon trust to pay certain debts out of the income, and then to make over the fund to C. At A's death the gift to C becomes vested in interest in him.

(vi) A fund is bequeathed to A, B and C in equal shares to be paid to them on their attaining the age of 18, respectively, with a proviso that, if all of them die under the age of 18, the legacy shall devolve upon D. On the death of the testator, the shares vested in interest in A, B and C, subject to be divested in case A, B and C shall all die under 18, and, upon the death of any of them (except the last survivor) under the age of 18, his vested interest passes, so subject to his representatives.

(This is sec. 106 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

(See next section).

Date of vesting when
legacy contingent
upon specified un-
certain event

120. (1) A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens.

(2) A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event becomes impossible.

(3) In either case, until the condition has been fulfilled, the interest of the legatee is called contingent.

Exception.—Where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit, the bequest of the fund is not contingent.

Illustrations.

(i) A legacy is bequeathed to D in case A, B and C shall all die under the age of 18. D has a contingent interest in the legacy until A, B and C all die under 18, or one of them attains that age.

(ii) A sum of money is bequeathed to A "in case he shall attain the age of 18," or "when he shall attain the age of 18." A's interest in the legacy is contingent until the condition is fulfilled by his attaining that age.

(iii) An estate is bequeathed to A for life, and after his death to B if B shall then be living; but if B shall not be then living to C. A, B and C survive the testator. B and C each take a contingent interest in the estate until the event which is to vest it in one or in the other has happened.

(iv) An estate is bequeathed as in the case last supposed. B dies in the lifetime of A and C. Upon the death of B, C acquires a vested right to obtain possession of the estate upon A's death.

(v) A legacy is bequeathed to A when she shall attain the age of 18, or shall marry under that age with the consent of B, with a proviso that, if she neither attains 18 nor marries under that age with B's consent, the legacy shall go to C. A and C each take a

contingent interest in the legacy. A attains the age of 18. A becomes absolutely entitled to the legacy although she may have married under 18 without the consent of B.

(vi) An estate is bequeathed to A until he shall marry and after that event to B. B's interest in the bequest is contingent until the condition is fulfilled by A's marrying.

(vii) An estate is bequeathed to A until he shall take advantage of any law for the relief of insolvent debtors, and after that event to B. B's interest in the bequest is contingent until A takes advantage of such a law.

(viii) An estate is bequeathed to A if he shall pay 500 rupees to B. A's interest in the bequest is contingent until he has paid 500 rupees to B.

(ix) A leaves his farm of Sultanpur Khurd to B, if B shall convey his own farm of Sultanpur Buzurg to C. B's interest in the bequest is contingent until he has conveyed the latter farm to C.

(x) A fund is bequeathed to A if B shall not marry C within five years after the testator's death. A's interest in the legacy is contingent until the condition is fulfilled by the expiration of the five years without B's having married C, or by the occurrence within that period of an event which makes the fulfilment of the condition impossible.

(xi) A fund is bequeathed to A if B shall not make any provision for him by will. The legacy is contingent until B's death.

(xii) A bequeaths to B 500 rupees a year upon his attaining the age of 18, and directs that the interest, or a competent part thereof, shall be applied for his benefit until he reaches that age. The legacy is vested.

(xiii) A bequeaths to B 500 rupees when he shall attain the age of 18, and directs that a certain sum, out of another fund, shall be applied for his maintenance until he arrives at that age. The legacy is contingent.

(This is sec. 107 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i, e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Estates and interests in property or in the subject of a bequest may be—
(1) Vested in possession, (2) Vested in interest but not in possession, (3) Contingent, or (4) Conditional.

The word "vest" being derived from "vestire", it has been said that naturally Meaning of "vest." it refers to vesting in possession, and not to vesting in interest. In ordinary language it is understood to mean "payable". This is, however, contrary to the provisions of sec. 119; and the word "vest" has been held to refer *prima facie* to vesting in interest or transmissibility, and not merely to vesting in possession or indefeasibility.

Under sec. 104 every legacy vests in the legatee on the death of the testator unless there is anything to the contrary in the will and if the legatee dies without receiving the legacy his legal representatives are entitled to it. This chapter deals with the subject of vesting when the enjoyment is postponed and the subject is divided into three main rules.

Rule I.—Vested—and this is subdivided into two parts (a) vested in possession and (b) vested in interest.

Rule II.—Contingent or Conditional.

Rule III.—Vested in interest but liable to be divested.

(a) A bequest is said to be vested in possession when there is a present right to the immediate possession or enjoyment.

As stated above according to sec. 104 if a legacy is given generally without specifying the time when it is to be paid it vests in the legatee on the testator's death, though it is not payable till the end of one year after the testator's death (sec. 337); and if the legatee dies after the testator but before receiving the legacy, his legal representatives will be entitled to the legacy, *Harris v. Brown*, 28 I. A. 159, 28 Cal. 621. This is vested in possession.

(b) Sec. 119 deals with the subject "vested in interest". A bequest is said to be vested in interest but not in possession, where there is a present *indefeasible* right to the *future possession* or enjoyment, e. g., a bequest to A for life with remainder to B. B has not the immediate possession of the bequest so long as A is alive, but his interest is vested, and if B predeceases A, his legal representatives will be entitled to it. (III. iii., sec. 120). Also if A dies in the lifetime of the testator B will take the legacy, *Venkayamma v. Narsamma*, 40 Mad. 540; *Ajudhia Buksh v. Musamut Rukin Kuar*, 11 I. A. 1.

Sec. 120 deals with "contingent bequests." A bequest is said to be contingent when its vesting depends upon the happening or not happening of a specified uncertain event.

The difference between a vested and a contingent interest is that a vested interest takes effect on the testator's death, unless there is a contrary intention in the will. Even though the legatee may not be entitled to immediate possession of the bequest by reason of a prior bequest or by reason of a provision in the will that the income arising from the fund is directed to be accumulated until the time for payment arrives, the legacy nevertheless becomes vested in interest in the legatee from the testator's death, and if the legatee dies before receiving the legacy, it shall pass to his legal representatives.

A contingent interest is contingent upon the happening of a contingency which may or may not take place. A vested interest is unconditional, only the enjoyment may be postponed. A contingent interest is dependent on the fulfilment of the condition which may or may not be fulfilled. In the one the gift is immediate, but the enjoyment may be postponed. In the other there is no gift until the contingency is fulfilled.

The mere postponement of the beneficial enjoyment therefore is no criterion for judging that the interest is contingent. (Sec. 119, Explanation). A distinction has been made between cases where the event in which the bequest is to take effect is uncertain, and those in which it is certain, though future. In the former the gift is held to be contingent, in the latter it is held to be vested.

The subject of contingent bequest is further treated in secs. 124-125.

Rule III.—Vested in interest but liable to be divested. A bequest vested in interest (but not in possession) may be so vested subject to being divested or *defeasible* on the happening of a specified event, e. g., where there is a gift to an infant with remainder over in the event of his dying under age, in which case the infant has a vested interest subject to be divested on his death under age, *Duffill v. Duffill*, (1903) A. C. 491.

There is also a marked distinction between a contingent interest and a vested interest subject to be divested. In the former the bequest is *not complete* until the specified uncertain event does or does not happen; in the latter the interest is *complete*, but on the happening of an event it may be divested.

There is also a distinction between a contingent bequest and a conditional bequest. The word "contingency" has reference to the happening of an event, whereas the word "condition" has reference to the doing or forbearing from doing some act.

The question for consideration under secs. 119 and 120 is to ascertain whether the words of futurity postpone the vesting or merely suspend possession or enjoyment of the thing bequeathed. In the former case the legatee has no interest, in the latter he has an interest which is transmissible to his legal representatives if the legatee dies before the arrival of the period of possession or enjoyment. The question whether particular words convey vested or contingent interest is often a question of construction, *Kally Nath v. Chunder Nath*, 8 Cal. 377. The tendency of the court at the present day is to give words their natural meaning and to ascertain from them what the intention of the testator was, *Harris v. Brown*, 28 I. A. 159.

Where, however, the intention is silent or is ambiguous the following rules may be applied:—

Rule—(1) A bequest to a person *payable, or to be paid, at, or when* he shall attain the age of 18, or at the end of any other *certain determinate term* confers on the legatee a vested interest immediately on the testator's death and transmissible to his executors or administrators. (See *ills. i., and ii., sec. 119*). For example, a gift to A payable at eighteen is vested as the time when the legacy is to be paid is certain, that is to say, the time will come if the legatee lives long enough. No doubt it is uncertain whether the legatee will ever attain the given age, but since he must attain it if he lives, this latter contingency is disregarded.

Examples.

(a) A testator bequeaths to his son £100 *to be paid* to him at the death of his mother. The son dies before the mother. The son takes a vested interest in the legacy and his legal representatives will be entitled to it, *Jackson v. Jackson*, 1 Ves. Sen. 217.

(b) A legacy of £100 is bequeathed to an apprentice *to be paid* to him within six months after he should have fully served out his apprenticeship. The boy runs away from his master and dies after the period of apprenticeship expires. The legacy is vested, *Sydney v. Vaughan*, 2 Bro. Parl. Ca. 251.

Rule—(2) When the time annexed to the payment is merely eventual and may or may not come, *e. g.*, a legacy to A payable or to be paid on marriage and A dies before the contingency happens, the legacy is contingent. (*Dies incertus conditionem facit*).

Example.

A legacy is bequeathed to E *to be paid* to her at the time of her marriage. E died without ever having been married after attaining majority. It was held that the legacy was contingent and lapsed, *Atkins v. Hiscocks*, 1 Atk. 500.

Rule—(3) If the words "payable" or "to be paid" are omitted and the legacies are given "at" eighteen, or "if," "when," "in case," "provided," the legatee attain

eighteen or any other future definite period, the legacy will be construed as contingent. Consequently if the legatee happens to die before that period arrives, his legal representatives will not be entitled to the legacy. (See illustrations *i, ii, iii*, sec. 120), *Onslow v. South*, 1 Eq. Cas. Abr. 295; *Cruse v. Barley*, 3 P. Wms. 19; *Stapleton v. Cheales*, (1700) Prec. Chanc. 317; *Hanson v. Graham*, 6 Ves. 245; *De Souza v. Vaz*, 12 Bom. 137; *Ranee Mani v. Premmoni*, 9 C. W. N. 1033.

Example.

A testator bequeaths £100 a-piece to the two children of J. S. "at the end of ten years next after my decease." The legatees die before the expiration of ten years. The legacies are contingent and will lapse, *Smell v. Dee*, 2 Salk. 415. For other examples see illustrations to sec. 120. See also *Bilaso v. Munni Lal*, 33 All. 558.

Rule—(4) If upon the construction of the will it *clearly* appears that the testator meant the time of payment to be the time when the legacy should vest, no interest will be transmissible to the executors or administrators, if the legatee dies before the period of payment, although the words "to be paid" or "payable" may have been employed in the will.

Examples

(a) A bequeaths £100 to be paid to B after all his debts are satisfied. B dies after A but before A's debts are satisfied. The legacy is not vested in B though the words to be paid are used. Here the testator shows clearly that the time of payment is after his debts are satisfied, *Martin v. Martin*, L. R. 2 Eq. 404.

(b) A bequest is made to A for life and after A's death to her "male descendants." A is delivered of a son who dies in A's lifetime. A dies subsequently leaving a husband who claims the legacy as the heir of the son. Held, husband not entitled as the son did not take a vested interest. No one can be heir of a living person, *Srinivasa v. Dandayudapani*, 12 Mad. 411.

Rule—(5) Where a testator bequeaths a legacy to a person at a future time

Sec. 120. Exception.

competent part thereof as may be necessary to be applied for his benefit, it indicates the testator's intention that the legatee should have the principal and the legacy will be construed as vested in the legatee. (Ill. *xii.* sec. 120). English law different. According to English cases a distinction has been made where the whole of the interest arising from the fund is given and where only a sufficient part of the income is directed to be employed for the maintenance and education of the legatee. In the former case the bequest is construed as vested, in the latter it is contingent and the reason is that it is the giving of interest and not the giving of maintenance which is held to effect the vesting. (See *Williams on Executors*, 10th Edn., p. 984). According to sec. 120, *exception*, the bequest is vested whether the whole or so much of the income as may be necessary is directed to be applied for the benefit of the legatee. An exception to this rule is when the bequest is to a class. (See sec. 121).

Examples.

(a) A legacy is bequeathed to E. to be paid to her at the time of her marriage and the testator directs that until her marriage the amount of the legacy be invested in authorized securities and the interest thereof be paid to E. E dies without ever having been married. The legacy is vested, *Booth v. Booth*, 4 Ves. 399. (See also Ill. *i.*, sec. 120).

(b) A testatrix gave all the rest of her stocks and shares upon trust to pay the income to her nephew G until his marriage and at the time of his marriage to hand over the stocks and shares to him. It was held G took a vested interest in the gift and being of age was entitled to have the stocks and shares transferred to him, although he had not married, *Re Wrey*, 30 C. D. 507. See also *Hoath v. Hoath*, 3 Bro. C. C. 4; *Hanson v. Graham*, 6 Ves. 245.

(c) A testator bequeathed a certain sum to the children of A when they should attain 25 with a direction that interest on the amount should be paid for their maintenance during their minorities, and there was no direction as to the application of the income between 21 & 25. The legacy was held to be vested, *Davies v. Fisher*, 5 Beav. 201.

(d) A Parsi by his will directed as follows:—"Should a son be born he shall be cherished, maintained, educated and brought up and when he comes of age my executors shall make over the estate to him; should the child die in tender age then my wife be paid Rs. 5000. Held, that the bequest to the son was contingent and did not fall within the exception to sec. 120, *Dadachanji v. Ratanbai*, 49 Bom. 167 (P. C.).

Rule—(6) But if the gift of the intermediate interest for the maintenance or benefit of the legatee be made out of *another* fund, the legacy will be considered as contingent. (See ill. xiii., sec. 120). Also if a legacy is directed to be paid as soon as the legatee attains majority *with interest* it will be contingent, *Knight v. Knight*, 2 Sim. and Stu. 490.

Rule—(7) Where a legacy is to be *severed instant* (at the death of the testator) from the general estate for the use and benefit of the legatee, the legacy is generally considered as vested. But where a legacy is to be severed only on the happening of a particular event, the legacy is considered contingent until the happening of that event. (Williams on Executors, 10th Edn., p. 986).

Examples.

A testator bequeathed to his executors all the East India stock standing in his name upon trust to accumulate the dividends until D should attain *twenty-five* and then to transfer the principal together with the accumulations to D, his executors, administrators, or assigns, absolutely. D was a minor at the testator's death. There was also a residuary bequest in the will. It was held that D took a vested interest in the legacy although he was a minor and was entitled to have the stock transferred on attaining *twenty-one*, *Saunders v. Vautier*, 1 Cr. and Ph. 240; *Husenbhoy v. Ahmedbhoy*, 26 Bom. 319; *Fulford v. Hardy*, (1909) A. C. 570; *Lloyd v. Webb*, 24 Cal. 44.

Rule—(8) A general rule to distinguish whether a legacy is vested or contingent in cases where the legacy is payable at a future time is, that if such payment or distribution appear to be postponed for the convenience of the fund or property or to allow of an intervening or limited interest, it is to be considered as vested, *e. g.*, a gift to one for life and after his death to others. If, however, the postponement is for reasons personal to the legatee, the legacy is to be considered as contingent, *e. g.*, when the legatee attains a particular age.

As to postponement until the legatee attains an age beyond majority such a direction is considered inoperative and the legatee takes a vested interest on his attaining majority, unless during the interval an interest is created in favour of some person, *Gosavi Shivraj v. Rivett Carnac*, 13 Bom. 463; *Husenbhoy v. Ahmedbhoy*, 26 Bom. 319; *In re Williams, Williams v. Williams* (1907) 1 Ch. 180; *In re Couturier, Couturier v. Shea* (1907) 1 Ch. 470.

Examples.

(a) A testator gives to P £200 at his wife's decease. P dies before the wife, the legacy is vested in P, *Blamire v Geldart*, 16 Ves. 314; *Bilasov v. Munni Lal*, 33 All. 558; *Bhagabati v. Kalicharan*, 38 Cal. 468.

(b) A Parsi devised his house to his wife for life and then to his son J for life and then to J's widow as to a portion and for J's issue. In default of issue in trust for another son K "if, then living." J died unmarried in the life time of the testator's widow. *Held*: that the words "then living" referred to the last antecedent and that on the death of J, K took a vested interest subject to the life interest of the testator's widow, *Capadia v. Capadia*, 43 Bom. 88; 45 I. A. 257.

Rule—(9) Where a legacy is given to be paid at a given epoch such as the legatee attaining eighteen or marriage and there is an intervening life interest so that the legacies are payable only after the death of the life tenant and there is also a gift over in the event of the legatee dying unmarried or before attaining the given age, the two circumstances are construed as follows:—The first circumstance—that of attaining eighteen—is considered personal to the legatee and the second—that of surviving the life tenant—one which affects the arrangement of the estate and in determining when the shares become vested, the Courts disregard the postponement of the estate and look at the personal period only.

Examples.

(a) A testator devises immoveable property to his wife for life and after her decease to be equally divided amongst his seven children—the share of his three sons to be vested in them respectively on their attaining twenty-one and the shares of his four daughters to be vested in them when they attained that age or married. There was a direction that during the minority of the children their respective shares were to be invested and applied toward their maintenance and it was provided that in case any of the children should die leaving issue "before the share of such child so dying should become due and payable" the share of the child so dying was to be equally divided among all the issue of such child as and when such issue shall attain majority. One of the daughters assigned her share by way of mortgage but died during the lifetime of the testator's widow leaving an infant child. It was held that the words "due and payable" did not postpone the vesting of the share of the children until the death of the tenant for life, the widow, and that the mortgagee was entitled to the share of the daughter and not her infant child under the gift over, *Mendham v. Williams*, L. R. 2 Eq. 396.

(b) A testator gave the residue of his property equally among four persons with a direction that in case any of the legatees should die before "the final distribution" of his estate, his share was to go over to his children. Two of the legatees died more than a year after the testator's death but before the estate had been fully realized and distributed. It was held that "final division" meant the period of a year from the testator's death and that the shares of the deceased legatees had not gone over *Re Collison*, *Collison v. Barber*, 12 Ch. D. 834. The division of the estate is the period allowed by law, i. e., the expiration of twelve months after the testator's death. If the legatee dies within the year the gift over will take effect. See also *Lucas v. Carline*, 2 Beav. 367, where a legacy was given to a servant with a direction that the same should be paid *within* six months after the decease of the testatrix who declared that the legacies should not be vested until payment. The legatee died before the expiration of six months and it was held that his representatives were entitled to it.

(c) A testator bequeathed to his daughter A, Rs. 10,000 with any interest that may accrue due "on her attaining 18.....if she marries to be settled on her and her children solely; should she die unmarried her money to be equally divided between her brothers or survivor." A on attaining 24 but whilst unmarried claimed the legacy, *Held*: A had a

vested interest subject to be divested on her dying at any time unmarried and subject to an executory trust in favour of her children in the event of her marrying, *In re C. M. Hunter*, 4 Cal. 420.

NOTE.—A divesting clause that the legacy should go over if the legatee should die before the legacy is actually received by the legatee is too uncertain and indefinite to be capable of being carried into effect. Per Lord Selborne in *Minors v. Battison*, (1876) 1 App. Cas. 428. Fry, J. is of opinion that in such a case the period for vesting would be the period allowed by law, *i. e.*, twelve months (*Re Chaston*, 18 C. D. 218) for the Court will not suffer the rights of the legatees to be prejudiced by the fraudulent or unnecessary delay of the executors. (See Williams on Executors, 10th Edn, p. 973, note 1.).

Gift over.—A bequest to a person if he should attain majority standing alone would be a contingent bequest; but if the bequest is followed by a limitation over in case he die under such age the bequest over is considered as explanatory of the sense that the testator intended that at that age the bequest should become absolute and indefeasible and must therefore be construed to vest *instantly*. For example, a bequest is made to A for life and then to his son as soon as the son attains majority, with a gift over to B if A should die without leaving a son who should attain majority, A's son, as soon as he is born, will take a vested interest, subject to be divested if he die under age. (See Jarman on Wills, 6th Edn, p. 1376). If on the death of A, his son is a minor, the son will be entitled to the immediate interest of the bequest, subject only to the chance of its being divested on a future contingency, *Phipps v. Ackers*, 9 Cl. and F. 583; *Colgan v. Adm.-General*, 15 Mad. 424 at 435; *Lallu v. Jagmohan*, 22 Bom. 409; *Chunital v. Bai Muli*, 24 Bom. 420. (On this subject see commentary on sec. 124, *ante* p. 165).

Where there is a gift to two or more persons as to A, B, and C to be paid to them on attaining 18 with a gift over to D, if all die under age, the defeasibility is restricted to the event of all of them dying under age and if any of them, say A, attains age, the gift over to D will not take effect, even though B and C may die under age. The shares of B and C being vested will, in such a case, pass to their representatives. (Ill. *vi.*, sec. 119). *Skey v. Barnes*, 3 Mer. 335.

When there is a gift at 18 or marriage under 18 with consent and a gift over upon marriage without consent, if the legatee attains 18 the gift over will be bad even though the first legatee may have married under age without consent. (Ill. *v.*, sec. 120).

This subject is further treated under sec. 124.

Time within which the contingency must occur.—Where time is fixed for the happening or not happening of a specified uncertain event the legatee does not take a vested interest until the event happens or the happening of that event becomes impossible. As for example, a legacy is bequeathed to A if B shall not marry C within five years after the testator's death. A's interest is contingent until the condition is fulfilled by the expiration of five years without B's having married C, or by the occurrence within that period of an event which makes the fulfilment of the condition impossible, *i. e.*, by B's marrying some other person. If B marries C within five years A takes no interest. If B does not marry C within five years or marries D within five years A's interest becomes vested. (Ill. *x.*, sec. 120).

Where there is no time fixed for the happening of the event, see sec. 124.

Transmissibility of Interest.—If a legatee takes a vested interest in the bequest, the bequest will be transmissible to his executors, administrators, or assigns in the event of his death before receiving the legacy, *e. g.*, a bequest is made to A for life and after his death to B absolutely. B takes a vested interest. B dies in the lifetime of A after having assigned his interest to C, C will be entitled to the legacy. If B has not assigned his interest his representatives will be entitled to it.

Contingent interest transmissible. A contingent interest will or will not be transmissible to the legal representatives of the legatee according to the nature of the contingency on which it is dependent. If the gift is to children who shall live to attain a given age, or shall survive a given period or event, the death of any child pending the contingency has obviously the effect of striking the name of such deceased child out of the class of presumptive objects; and consequently such interest can never devolve to the representatives of the child. Generally where the contingency upon which the interest depends is the endurance of the life of the party entitled to it till a particular period, the interest will be extinguished by the death of the party before the period arrives, and will not be transmissible to his legal representatives. For example, a fund is bequeathed to such of the children of A as shall attain the age of 18. No child of A who is under the age takes such an interest in the fund as will be transmissible to his representatives on his dying under that age.

Where, however, the contingency on which the vesting depends is a *collateral* event, irrespective of attainment to a given age and surviving a given period, the death of the legatee pending the contingency does not determine the interest of the legatee but simply substitutes and lets in the legatee's representatives for himself. For example, a testator directed that in case his wife should die without issue by him, then, after her decease, his brother should get £80. The brother died in the lifetime of the widow, who afterwards died without leaving any issue. It was held that the brother's executors were entitled to the legacy. *Pinbury v. Elkin*, 1 P. Wms. 563; *King v. Withers*, Cas. temp. Talb. 117; *Chauncy v. Graydon*, 2 Atk. 616; *Peck v. Parrott*, 1 Ves. Sen. 236; *Re Cresswell*, 24 Ch. D. 102; *Ellokassee Dossee v. Durponarain*, 5 Cal. 59. (Williams on Executors, 10th Edn., pp. 670-672; Jarman on Wills, 6th Edn., p. 1353).

Hindu Law and Contingent Bequests.—Sections 119 & 120 apply to Hindus governed by the Hindu Wills Act. A contingent interest *in futuro* of the whole estate of the testator is valid and operative, *Bhupendra v. Amarendra*, 41 Cal. 642. But in case of *the will of a Hindu to whom the Hindu Wills Act does not apply* the following principles of Hindu law must be borne in mind: *Firstly*, that the event on which the gift is contingent must happen, if at all, immediately on the close of a life in being at the death of the testator; and, *secondly*, that a defeasance by way of gift over must be in favour of somebody in existence at the death of the testator, *Soorjeemoney v. Denobundhoo Mullick*, 6 M. I. A., 526; *Tagore v. Tagore*, 9 B. L. R., 377.

Similarly under Hindu law a grant by way of remainder is valid provided—

- (1) it is made to a person in existence at the death of the testator, and
- (2) the grant is to take effect immediately on the close of a life in being at the death of the testator.

In construing Hindu Wills it must also be remembered that a bequest to a widow is ordinarily for life; hence in a bequest of the following kind, *viz.*, "When I die my wife is the owner and after the death of my wife my daughter shall be my heir", the construction will be that the wife will take a life interest and the daughter a vested remainder, *Lallu v. Jagmohan*, 22 Bom. 409; *Chunilal v. Bai Muli*, 24 Bom. 420.

Vesting of interest in bequest to such members of a class as shall have attained particular age.

121. Where a bequest is made only to such members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy.

Illustration.

A fund is bequeathed to such of the children of A as shall attain the age of 18, with a direction that, while any child of A shall be under the age of 18, the income of the share, to which it may be presumed he will be eventually entitled, shall be applied for his maintenance and education. No child of A who is under the age of 18 has a vested interest in the bequest.

(This is sec 105 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec 57, i.e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

This section is a further amplification of a gift to a class when the period is postponed. A gift to a class is dealt with under secs. 98, and III *ante* p. 107 and 124.

This section is an exception to sec. 119. Under sec. 119 if the payment is postponed but if interest is directed to be applied then the legatee takes a vested interest. Under this section if the bequest is to a class and even if interest is directed to be paid no member of the class who has not attained that age will get a vested interest (see illustration). But if he once attains the age the interest will vest though he may die before the period of distribution, *e.g.*, if the distribution is postponed until the youngest member of a class shall attain a given age, then the reason of the postponement being partly for convenience of the estate and partly personal to each legatee, every member of a class will take a vested interest upon attaining the given age, notwithstanding that he may die before the youngest attains the given age or the youngest child may fail to attain that age.

In the case of *In re Kipping, Kipping v. Kipping*, (1914) 1 Ch. 62, a testator bequeathed his property to trustees for sale and conversion with a direction to postpone the sale and to pay £50 to his widow and subject thereto in trust for all and every of his children and child who shall attain 21 in equal shares, "provided always that the capital should not be divisible amongst my children until my youngest surviving child shall attain 21." The testator left seven children, two attained 21 and five were minors. One of the two claimed his share. *Held*, that he was entitled on attaining 21 to a vested share but was not entitled to claim it so long as the trustees in the *bona fide* exercise of their discretion determined to postpone the realization of the estate.

(See further on this subject sec. III page 125).

This section considerably simplifies the rule of English Law where in a case of a bequest to children at a particular age or when they attain a particular age complicated questions arise as to whether the bequest is vested or contingent, if interest is given in the meantime and the cases are conflicting. (See *Leake v. Robinson*, 2 Mer. 385; *Cromek v. Lumb*, 3 Y & C. 565; *Webster v. Boddington*, 26 Beav. 128; *Thomas v. Wilberforce*, 31 Beav. 299). According to this section in a gift to a class at a particular age, a person who has not attained that age cannot have a vested interest in the legacy *even if there is a direction that the intermediate income of the share of any member of the class to which he will presumably be eventually entitled shall be applied for his maintenance or education.* See *Ballin v. Ballin*, 7 Cal. 218.

CHAPTER IX.

Of Onerous Bequests.

122. Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully.

Illustration.

A, having shares in (X), a prosperous joint stock company and also shares in (Y), a joint stock company in difficulties, in respect of which shares heavy calls are expected to be made, bequeaths to B all his shares in joint stock companies, B refuses to accept the shares in (Y). He forfeits the shares in (X).

(This is sec 109 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

(See next section).

123. Where a will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous.

One of two separate and independent bequests to same person may be accepted, and other refused.

Illustration.

A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is higher than the house can be let for, bequeaths to B the lease and a sum of money. B refuses to accept the lease. He will not by this refusal forfeit the money.

(This is sec. 110 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

As to whether the will contains two separate and independent bequests or is one, is always a question of intention to be gathered from the words in the will, *Talbot v. Radnor*, 3 M & K 252. Connected with the question of onerous bequest

is also another principle that a legatee who accepts a position conferred on him by a will cannot at the same time repudiate so much of the will as conveys an interest to another person, *Board v. Board*, (1873) 9 Q. B. 48; *Rupchand v. Sarbessur*, 3 C. L. J. 629; *Durga Das v. Ishan Chandra*, 44 Cal. 145.

CHAPTER X.

Of Contingent Bequests.

124. Where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable.

Bequest contingent upon specified uncertain event, no time being mentioned for its occurrence

Illustrations.

(i) A legacy is bequeathed to A, and, in case of his death, to B. If A survives the testator, the legacy to B does not take effect.

(ii) A legacy is bequeathed to A, and, in case of his death without children, to B. If A survives the testator or dies in his lifetime leaving a child, the legacy to B does not take effect.

(iii) A legacy is bequeathed to A when and if he attains the age of 18, and, in case of his death, to B. A attains the age of 18. The legacy to B does not take effect.

(iv) A legacy is bequeathed to A for life, and, after his death to B, and, "in case of B's death without children," to C. The words "in case of B's death without children" are to be understood as meaning in case B dies without children during the lifetime of A.

(v) A legacy is bequeathed to A for life, and, after his death to B, and, "in case of B's death," to C. The words "in case of B's death" are to be considered as meaning "in case B dies in the lifetime of A."

(This is sec. 111 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 67, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

This section was enacted to give statutory effect to the decision in *Edwards v. Edwards*, 15 Beav. 357, which was in part overruled by *O'Mahoney v. Burdett*, L. R. 7 H. L. 388 and *Ingram v. Soutten*, 7 H. L. 408 at 421. See *Soundararajan v. Natarajan*, 44 Mad. 446 at 463. Ill. (iv.) is a reproduction of what is known as the fourth rule in *Edwards v. Edwards*. This rule, however, was overruled in *O'Mahoney v. Burdett*, *supra*., where the House of Lords decided that where a legacy was given to A for life with remainder to B, but if B should die without a child or unmarried or under twenty-one then over, the death in such cases means death at any time and not death in the lifetime of the tenant for life as in ill. (iv.).

This section is a counterpart to sec. 120 and its proper place would be after sec. 120 as both deal with contingent bequests. The difference is, that under sec. 120 the time for the happening of the contingency is mentioned. This section comes into operation when no time is mentioned, *Bhupendra v. Amarendra*, 43 Cal. 432 (P. C.); 43 I. A. 12. In such a case the test to be applied as laid down by this section

is to ascertain *what is the period of distribution*; and this period is either the death of the testator or the death of the life tenant and in case of more than one life tenants the death of the last survivor of the life tenants, *Cripps v. Wolcott*, 4 Madd. 11; *Poultney v. Poultney*, (1912) 2 Ch. 541. In ill. (i. ii., & iii.) the period of distribution is the death of the testator; in ill. (iv. & v.) the period is the death of the tenant for life. If the contingency has not occurred before or at the period of distribution the gift will fail. In *Manikyamala v. Nanda Kumar*, 33 Cal. 1306, a bequest was made to an adopted son and on his death and until another adoption to the testator's widow and no time was mentioned for the happening of the death of the adopted son who survived the period of distribution and it was held that the bequest over to the widow failed. In all these cases of "in case of death" though death is a certainty the uncertainty lies in the occurrence of death at any particular period, *Jehangir v. Kaikhusru*, 39 Bom. 296 (P. C.). In *re Hunter*, 4 Cal. 420, a testator bequeathed to his daughter A Rs. 10,000, with interest on her attaining the age of 18, "if she married to be settled on her and her children; should she die unmarried, her money to be equally divided between her brothers or survivor". A attained 24 and whilst unmarried claimed the legacy. It was held following *O'Mahoney v. Burdett*, *supra.*, that A had a vested interest subject to be divested on her dying at any time unmarried and subject to an executory trust in favour of her children in the event of her marrying at any time and that she was entitled to the corpus. See also *Kumar Chandra v. Prasanna*, 38 I. A. 7.

Sometimes the bequest is made to persons "then living." The words "then living" may mean the period of distribution or the death of the testator or the death of the tenant for life and it is always a question of construction. In *Capadia v. Capadia*, 45 I. A. 257, the words were "subject to the life interest of the widow of the testator" to J for life and in the event of J's death in trust for J's widow and issue as J may by his will appoint and in default of any such issue and subject to any such appointment for his widow in trust for K "if then living." J died unmarried in the lifetime of the testator's widow and of K. It was contended that the words "then living" related to the last antecedent, *viz.*, the death of the widow and that until the widow died K took no interest. It was held by their Lordships of the Privy Council that on the death of J, K took an absolute vested interest and that it was conditional on K surviving the life tenant. In *Norendra Nath v. Kamalbasini*, 23 Cal. 563 (P. C.), 23 I. A. 18, a Hindu bequeathed as follows:—"My three sons shall be entitled to enjoy all the property left by me equally. Any one of the sons dying sonless the surviving sons shall be entitled to all the properties equally." It was held by their Lordships of the Privy Council that the words gave a legacy to the survivors contingently on the happening of a specified uncertain event which had not happened before the period of distribution, *viz.*, the date of the death of the testator; that the period was not postponed by reason of the personal incapacity of the beneficiaries. Therefore, under sec. III of the old Act the legacy to the surviving brothers could not take effect and the original gift to the testator's three sons was absolute to each in equal shares and was indefeasible on his death. Having regard to the judgment in the above Privy Council case it was held in *Lala Ramjewan v. Dal Koer*, 24 Cal. 406 that the provision for survivorship applied only to the case of a legatee dying in the lifetime of the testator and not at any time. In *Monohur Mukerjee v. Kasiswar Mukerjee*, 3 C. W. N. 479, a testator bequeathed a legacy to K with a proviso that "if after the expiration of nine years from my death K should die without a son or grandson then M, shall get the legacy." The

uncertain event of K's death without a son or grandson did not happen before nine years. It was held that K took absolutely. In *Nistarini v. Behary Lal*, 19 C. W. N. 52, a testator bequeathed as follows:—"I bequeath to both of you (*i. e.*, widow and brother's daughter). If one of you should die before the other whoever will survive will be the *malic*." Both survived the testator. It was held that the widow took an absolute interest. In *Kumud Krishna v. Jogendra*, 21 C. W. N. 854, a bequest was made to D on her attaining majority, but if she died childless the property was to go to P. D survived the testator and attained majority but died childless. It was held that D took absolutely and the gift over failed. The gift to P could only take place if the event on which it depended happened before the period of distribution, *i. e.*, if D had died before the testator or died a minor. See also *Sardar Nowroji v. Putlibai*, 15 Bom. L. R. 352. In *Chunilal v. Bai Samrath*, 16 Bom. L. R. 366 (P. C.), a Hindu to whom the Hindu Wills Act did not apply after devising the whole of his property to his two sons in equal shares provided that "should either of these two sons die without having had (leaving) any male issue the survivor is duly to take the whole of the property appertaining to the share of the deceased son who may have (leave) no male issue. It was held that the period to which the gift over referred was the period of the death of either of the two sons leaving no male issue *whenever such death occurred either before or after the death of the testator*. It was further held that looking to the whole will on the death of one of the two sons (both of whom survived the testator) leaving no male issue the surviving sons took the property appertaining to the share of the deceased son. In this case their Lordships of the Privy Council followed *O' Mahoney v. Burdett*, *supra*. It is difficult to reconcile this decision with the rule laid down by this section and the illustrations except on the question of the construction of the will in that particular case. See *contra*, *Jehangir v. Kaikhusru*, 39 Bom. 296 (P. C.). The following further cases on sec. 111 may be noted, *Ellokassee v. Durponarain*, 5 Cal. 59; *Ramlal v. Secretary of State*, 7 Cal. 304, 8 I. A. 46; *Tarachurn v. Sureshchunder*, 17 Cal. 122 (P. C.); *Chandra v. Prasanna*, 38 Cal. 327 (P. C.); *Jagat Bijoy v. Tomijuddi*, 44 Cal. 181; *Soundararajan v. Natarajan*, 44 Mad. 446.

The ratio decidendi from these cases is, that sec. 124 lays down a hard and fast rule regulating the validity of certain classes of contingent bequest when there is no time fixed for the occurrence of the contingency and must be applied to cases strictly coming within its scope without speculating on the intention of the testator. The specified uncertain event must occur before the period of distributoin, *Monohur Mukerjee v. Kasiswar Mukerjee*, 3 C. W. N. 479. The rule should not be applied when the testator mentions the event on the occurrence of which the distribution is to take place, *Bhupendra v. Amarendra*, 43 Cal. 432 (P. C.).

Gift Over.—Generally if there is a gift to A with a gift over in the event of his dying under age, the following rules apply:—

- (1) If A dies under age in the lifetime of the testator, the gift over takes effect.
- (2) If A dies after attaining majority in the testator's lifetime, the gift over does not take effect. (Ill. f., sec. 124).

If there is an immediate gift to A and a gift over to B in case of his death, the gift over to B will take effect only in the event of A's death before the testator. (Ill. f., sec. 124). If the gift to A is after a life estate or a time is appointed for pay-

ment, the words "in case of death" refer to death at any time before the vesting in possession. (Ill. *iv.*, sec. 124).

If there is a gift "at" or "upon attaining twenty-five" with a gift over in the event of the legatee dying under twenty-one, the gift is vested at 21 and the gift over will not take effect, *Doe v. Moore*, 14 East 601. If the gift is at 24, with a gift over in the event of the legatee dying under the given age without leaving issue, the gift over will not take effect if the legatee dies at whatever age leaving issue, *Bland v. Williams*, 3 M. & K. 411. So also a gift after a life interest to the children of the life tenant at 21 with a gift over in the event of the life tenant dying without leaving issue has been held to be vested at the death of the life tenant but not before, *Bree v. Perfect*, (1844) 1 Coll. 128. See, however, *contra Re Edwards*, *Jones v. Jones*, (1906) 1 Ch. 570. In *Colgan v. Adm.-General*, 15 Mad. 424, a testator bequeathed Rs. 42,000 to his grand daughter for life and after her death to her children as she should appoint but in the event of her dying without issue "Rs. 14,000 should be given to her husband", and the grand daughter died without issue. It was held that the husband took a vested interest.

125. Where a bequest is made to such of certain persons as shall be surviving at some period, but the exact period is not specified, the legacy shall go to such of them as are alive at the time of payment or distribution, unless a contrary intention appears by the will.

Bequest to such of certain persons as shall be surviving at some period not specified.

Illustrations

(i) Property is bequeathed to A and B to be equally divided between them, or to the survivor of them. If both A and B survive the testator, the legacy is equally divided between them. If A dies before the testator, and B survives the testator, it goes to B.

(ii) Property is bequeathed to A for life, and, after his death, to B and C, to be equally divided between them, or to the survivor of them. B dies during the life of A; C survives A. At A's death the legacy goes to C.

(iii) Property is bequeathed to A for life, and after his death to B and C, or the survivor, with a direction that, if B should not survive the testator, his children are to stand in his place. C dies during the life of the testator; B survives the testator, but dies in the lifetime of A. The legacy goes to the representative of B.

(iv) Property is bequeathed to A for life, and, after his death, to B and C, with a direction that, in case either of them dies in the lifetime of A, the whole shall go to the survivor. B dies in the lifetime of A. Afterwards C dies in the lifetime of A. The legacy goes to the representative of C.

(This is sec. 112 of the Succession Act X of 1985. It applies to Hindus within the territories mentioned in sec. 67, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

This section is a corollary to sec. 124.

Gift to Survivors.—The word "survivor" may either be a word of limitation or it may denote a class of persons, *e. g.*, if a bequest is made to A, B, and C, as tenants-in-common for life with benefit of survivorship, the word "survivorship" refers to the extent of the estate and not to the class of persons, and upon the death

of any one of A, B, and C, the remaining tenants-in-common take the whole estate. Sometimes the word "survivors" is construed to mean "others", *e.g.*, where there is a bequest to several persons with a gift to the survivors, if any die without issue. (See *Lucena v. Lucena*, (1877) 7 C. D. 255).

Primâ facie survivorship is to be referred to the period of distribution and it may mean the time of the testator's death or at the time of some event contemplated by the will. The general rule is that the survivor is to be construed in its natural sense, *Inderwick v. Tatchell*, (1903) A. C. 120, and if the words of the will are clear effect will be given to the same. In *Gurusami v. Sivakami*, 18 Mad. 347 (P. C.), a testator bequeathed his property to his two daughters for life and he added, "If both the daughters shall *have issue* they shall divide the property equally. Those who have no issue shall enjoy the income for life." One of the daughters whose only issue died before her claimed that she was absolutely entitled to the half of the property. It was held that the words "have issue" did not mean "leave issue" and the condition was satisfied and she was absolutely entitled.

At what Period is the Class of Survivors to be Ascertained.—When there is no period specified in the will for the fixing of the class of survivors, the class is fixed at the time of payment or distribution, unless there is a contrary intention in the will, that is to say, if there is no previous interest given in the legacy, then the period of division is the death of the testator and the survivors at his death will take the whole legacy. (Ill. i, sec. 125). But if a previous life estate is given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole legacy, *Cripps v. Wolcott*, 4 Madd. 11; *Poultney v. Poultney*, (1912) 2 Ch. 541 (C. A.); ill. ii., sec. 125. When there is a gift to A for life and after his decease to his children or survivors, the children of A take a vested interest subject to be divested in favour of such as survive A. If all predecease A, *their respective representatives* will take the share of each child, for the event which was to divest not having happened the original gift remains, *Browne v. Lord Kenyon*, 3 Madd. 410, (Ills. iv., & v., sec. 131). Illustration iii., to sec. 125 is an example of a contrary intention where the survivorship is considered to refer to the death of the testator, and not the death of the tenant for life. Illustration (iv.) is also an example of a contrary intention, *Inderwick v. Tatchell*, (1903) A. C. 120; *Yethirajulu v. Mukunthu*, 28 Mad. 363.

In *Maden v. Taylor*, 45 L. J. Ch. 569, it was laid down that where a bequest was made upon death without issue, the survivors were to be ascertained whenever the event upon which the shares were given over occurred. For example, when a bequest is given to A, B, and C for life with remainder to their children, and in the event of any of them dying without issue, the shares of those so dying are given to the survivors absolutely. In the event of the last survivor dying without issue, such last survivor was construed to take his share *absolutely*. But this construction is now overruled and the share of the last survivor dying without children goes over and either falls into the residue or lapses, *Davidson v. Kimpton*, 18 Ch. D. 213; *Norrell v. Gissing*, 41 Ch. D. 409.

Survivorship where the gift is upon death without issue.

CHAPTER XI.

Of Conditional Bequests.

Introduction.

A conditional legacy may be defined to be a bequest, the existence of which depends upon the happening or not happening of some *uncertain* event by which it is either to take place or to be defeated.

Definition

No precise form of words is necessary to create a condition but when it appears that a condition was intended that intention must be carried into effect. Conditional bequests are not the same as contingent bequests. The word "contingency" has reference to the happening of an event; the word "condition" has reference to the doing or forbearance from the doing of some act.

Conditions are of two kinds—conditions precedent and conditions subsequent.

Conditions precedent or subsequent.

The former precede the vesting of estate, (*Sri Veerabhadra v. Chiranjivi*, 32 I. A. 105); the latter are to be performed after the estate has become vested and if not performed may, in many cases, cause interests already vested to be divested or to be altogether void.

Where the condition is precedent the estate is not vested in the grantee until the condition is performed, but where the condition is subsequent the estate vests immediately in the grantee and remains in him till the condition be broken.

Whether a condition is precedent or subsequent must depend on the language in which it is framed and very little help can be derived from decided cases on the point. If the meaning of the context is that the condition requires something to be done which will take time, the argument is in favour of construing it as a condition subsequent. On the other hand, a condition which involves anything in the nature of consideration is in general a condition precedent. As a general rule, law favours the early vesting of estates and for that reason Courts will lean towards construing a condition to be subsequent rather than precedent, if there is ambiguity in the language.

Secs. 126, 127, 128 relate to conditions precedent.

Secs. 129, 130, 131, 132, 133, 134, 135, 136 relate to conditions subsequent.

Bequest upon impossible condition.

126. A bequest upon an impossible condition is void.

Illustrations.

(i) An estate is bequeathed to A on condition that he shall walk 100 miles in an hour. The bequest is void.

(ii) A bequeaths 500 rupees to B on condition that he shall marry A's daughter. A's daughter was dead at the date of the will. The bequest is void.

(This is sec. 118 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

Bequest upon illegal or immoral condition.

127. A bequest upon a condition, the fulfilment of which would be contrary to law or to morality, is void.

Illustrations.

(i) A bequeaths 500 rupees to B on condition that he shall murder C. The bequest is void.

(ii) A bequeaths 5,000 rupees to his niece if she will desert her husband. The bequest is void.

(This is sec. 114 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

As to what conditions are valid it has been said that nothing can be made the subject of a condition in a will which could not be made the subject of a contract or wager in life, *Egerton v. Earl of Brownlow*, (1853) 4 H. L. C. 1. A man has a right to impose any condition subject to this qualification that the disposition must be consistent with law and morality. The well known case is the case quoted above, (*Egerton v. Brownlow*) where the property was given to Lord Alford with a proviso that if Lord Alford died without acquiring the title of the Duke or Marquis of Bridgewater then the estate was to cease. It was held by the House of Lords that the condition was against public policy and was void and the heirs of Lord Alford were entitled to the property without any condition. Hence these sections enact that with respect to conditions *precedent* which are impossible, immoral, or contrary to law the rule is that the bequest is void, *Tayaramma v. Sitaramasami*, 23 Mad. 613. If the condition is subsequent the condition is rejected and the gift is good, see sec. 120.

Gift to Mistress.—If a bequest is made in consideration of the legatee living with the testator as his mistress it is void, *Tayaramma v. Sitaramasami*, 23 Mad. 613. See, however, *contra*, *Ram Sarup v. Bela*, 6 All. 313; *Lachmi Narain v. Wilayti Begam*, 2 All. 433.

Condition that the Legatee shall reform his character and lead a moral life.—Such conditions are valid, *Tattersall v. Howell*, 2 Met. 26.

Conditions as to Religion.—A condition of forfeiture in case the legatee embraces a peculiar faith, or marries a person embracing a peculiar faith, or marries a domestic servant is good, *Hodgson v. Holford*, 11 Ch. D. 959; *Perrin v. Lyon*, 9 East 170; *Jenner v. Turner*, 16 Ch. D. 188. See, also, *Putlibai v. Sorabji*, 25 Bom. L. R. 1099.

Condition in restraint of alienation.—Where the bequest to a legatee is absolute in terms but there is a condition restraining the legatee from spending, or disposing of, or alienating the subject of the bequest generally, the condition is void and the bequest is absolute. In other words, conditions which are repugnant to an estate already given are void, e.g., where there is a devise in fee followed by an absolute restraint upon alienation, *Hood v. Oplander*, 34 Beav. 513; *Bradley v. Peixoto*, 3 Ves. 324; *Re Dugdale*, 38 C. D. 176; *Chimanrao v. Rambhau*, 4 Bom. L. R. 508; *Rajonoyee Dassee v. Troylukho*, 29 Cal. 260; *Rameshwar v. Lachmi*, 31 Cal. 111; *Prevost v. Prevost*, (1908) A. C. 541; *Anantha v. Nagamuthu*, 4 Mad. 200. The intention to pass the whole estate must be clearly expressed, *Sookhmoy Chunder v. Srimati*, 12 I. A. 103; *Lloyd v. Webb*, 24 Cal. 44. (See sec. 138). If, however, there is a disposition of intermediate interest the restriction is not bad, *Prasulla Chunder*

v. *Jogendra Nath*, 9 C. W. N. 528. Also a condition restraining alienation of property to a particular person or before a particular time is good, *In re Macleay* L. R. 20 Eq. 186; *Doe d. Gill v. Pearson*, 6 East. 173.

Condition making interest Determinable on Insolvency.—Note the difference between the Transfer of Property Act, sec. 31 and the Succession Act, sec. 131 on this subject. Sec. 31 of the Transfer of Property Act corresponds with sec. 131 of this Act, i. e., under both the Acts a bequest or transfer may be made with conditions superadded that it shall cease to exist in case a specified uncertain event shall or shall not happen. But sec. 31 of the Transfer of Property Act is subject to sec. 12 of that Act under which a condition making the interest of the grantee determinable on his insolvency is void. There is no corresponding section in the Succession Act. It would therefore appear that a condition making the interest of the legatee determinable on his insolvency would not be void. (See ill. vii, sec. 120). It appears that both in England as well as in this country a testamentary bequest to a person defeasible on his becoming insolvent is valid. As regards transfer *inter vivos*, sec. 12 of the Transfer of Property Act is a departure from this rule. The rule is also a departure from the English rule which sanctions such conditions, as such a provision appears to be a common forfeiture clause in English conveyances, *Brandon v. Robinson*, 18 Ves. 429. Such a condition is not *per se* illegal. But the provisions of the Bankruptcy Act in England and the Insolvency Acts in India may make such conditions void, if the effect of such condition is of defeating or delaying the claims of the creditors. See *Re Machu*, 21 C. D. 838; *Re Dugdale*, 38 C. D. 176; *Hormusji v. Dadabhoy*, 20 Bom. 310.

Condition not to dispute the will.—In England a condition that the legatee shall not dispute the will, though considered valid in law, is generally considered merely as a sort of terror or as it is termed *in terrorem* to the legatee and will not operate as a forfeiture by the legatee disputing the will, unless there is coupled with this condition a gift over, e. g., a legacy of £100 is given to A, provided A shall not dispute the will. A disputes the will but the will is held valid. A does not lose his legacy. But if the legacy of £100 is given over to B if A shall dispute the will, then A will lose his legacy if he disputes the will.

In India sec. 134 gets rid of this rule. If the condition subsequent is valid, if accompanied by a gift over, it will be equally valid without a gift over and will not be considered as *in terrorem*. Hence in the above example A will lose his legacy in both the cases. (See ill. ii., sec. 131).

Conditions in restraint of Marriage.—(See sec. 128 ante p. 172).

128. Where a will imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, the condition shall be considered to have been fulfilled if it has been substantially complied with.

Fulfilment of condition precedent to vesting of legacy.

Illustrations.

(f) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C, D and E. A marries with the written consent of B, C is present at the marriage. D sends a present to A previous to the marriage. E has been personally informed by A of his intentions, and has made no objection. A has fulfilled the condition.

(ii) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. D dies. A marries with the consent of B and C. A has fulfilled the condition.

(iii) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries in the lifetime of B, C and D, with the consent of B and C only. A has not fulfilled the condition.

(iv) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A obtains the unconditional assent of B, C and D to his marriage with E. Afterwards B, C and D capriciously retract their consent. A marries E. A has fulfilled the condition.

(v) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries without the consent of B, C and D, but obtains their consent after the marriage. A has not fulfilled the condition.

(vi) A makes his will whereby he bequeaths a sum of money to B if B shall marry with the consent of A's executors. B marries during the lifetime of A, and A afterwards expresses his approbation of the marriage. A dies. The bequest to B takes effect.

(vii) A legacy is bequeathed to A if he executes a certain document within a time specified in the will. The document is executed by A within a reasonable time, but not within the time specified in the will. A has not performed the condition, and is not entitled to receive the legacy.

(This is sec. 115 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Characteristics of Conditions Precedent and Subsequent.—(1) With respect to the performance of conditions the general rule is that in case of a condition precedent, if the condition is performed *cy præs* as it is termed, that is to say, if it has been *substantially* complied with, it will be sufficient. But where there is a condition precedent to the vesting of the interest of a devisee and on his failing to perform the condition *the property is given over* that condition must be complied with strictly. (Williams on Executors, 10th Edn., p. 1013).

With regard to conditions subsequent as they go to divest estates already vested they are to be construed *with great strictness*. The very event consequent to be performed must happen or the act with all its details must be done in strictly order to deprive the first legatee of his legacy.

(2) With respect to conditions *precedent* which are impossible, immoral, or contrary to law, the rule is that the bequest is void, *Tayaramma v. Sitaramasami*, 23 Mad. 613.

But where the condition *subsequent* is impossible, immoral, or contrary to law the rule is that the original legacy is single and absolute, but only the ulterior bequest is void, as the condition on which the ulterior bequest depends is void.

(3) If the condition is performed by the testator himself the legatee is not entitled to anything as the performance became impossible, *Rajendra v. Mrinalini*, 48 Cal. 1100; but if the condition is performed by the legatee in the lifetime of the testator he will be entitled (see ill. vi.). If the condition becomes impossible of performance during the lifetime of the testator the legatee will not be entitled, *e. g.* A bequeaths a legacy to B on condition that B shall marry A's daughter who wa

alive at the date of the will but who died before the marriage could be solemnized. The bequest to B is void as the condition is impossible.

Conditions in restraint of Marriage.—Formerly all conditions in restraint of marriage were regarded as illegal and legacies were discharged of such conditions whether precedent or subsequent. Now it is settled that conditions which impose an absolute restraint of marriage are void, but if the restraint is reasonable, *e. g.*, not to marry under twenty-one, or without the consent of a certain person, and the like, such conditions are valid. Also a bequest to a person until that person marries and when he marries, then over, is a valid bequest, especially in case where the bequest is to a widow.

With regard to the conditions requiring marriage with the *consent* of certain persons, either executors, trustees, or others, it has been decided that such consent must be obtained before or at the marriage and not afterwards. Consent obtained subsequently will not be a performance of the condition (Ill. *v.*), and the consent of all the executors, trustees, or other persons whose consent is required must be obtained, if they are in existence; a consent of the majority is not sufficient. (Ill. *iii.*). Where a bequest was made to a person on the condition of his marrying with the consent of his parents and one of the parents had died and the legatee married with the consent of the surviving parent, it was held that the condition was complied with. (Ill. *ii.*).

A general consent to any marriage is sufficient (*Mercer v. Hall*, 4 Bro. C. C. 326), and a consent once given without any condition cannot be retracted from caprice or some bad motive unless the consent was obtained through fraud or deceit, *Dashwood v. Peyton*, 18 Ves. 27. (Ill. *iv.*). A consent may be conditional. A consent may also be implied as from the circumstance that the person whose consent was required was present or sends a present at the marriage. (Ill. *i.*). If the legatee marries in the lifetime of the testator with his consent that is sufficient. (Ill. *vi.*). The condition is complied with by a *first* marriage and does not extend to a second marriage contracted without the consent of the person whose consent is required in the condition, *Crommelin v. Crommelin*, 3 Ves. 227. (See ill. *ii.*, sec. 132).

If the legatee takes such a step as renders impossible or indefinitely postpones the performance of the act required of him the legatee forfeits the legacy. For example, a bequest is made to A on the condition that he marries B's daughter. If A marries a stranger, he forfeits the legacy. This is not in consonance with the English law on the subject. In *Lester v. Garland*, 15 Ves. 248, a testator gave certain legacies to J and M and added, "If either of these girls should marry into the families of G or R and have a son, I give all my estate to him for life (with remainder over), and if they shall not marry" then the same was given to other person. J and M married into other families. Lord Thurlow held that nothing vested in the devisees over while the performance of the condition by J and M was possible *which was during their whole lives*; and that their having married into other families did not preclude the possibility of their performing the condition as they might survive their first husbands.

It has been observed that in case of the death of one of the executors before the marriage of the legatee the consent of the surviving executor or executors is a sufficient performance of the condition, but if all the executors die before the marriage of the legatee a question may arise whether the right to give consent vests in the legal representatives of the last dying executor or whether it is confined to the executors named personally, and on this point Lord Eldon has laid down in *Grant v. Dyer*, 2 Dow. 73, that, "The general course of decisions go to confine the power of giving or withholding consent to those who are personally named and *not* to extend it to their representatives." (Williams on Executors, 10th Edn., p. 1024, foot-note g).

Another question on the subject of consent arises, whether the Court will interfere if the executors or trustees whose consent is required refuse to give their consent and the answer is the Court will interfere and direct an inquiry into the proposed marriage and as to its propriety and if the marriage should be found suitable it will direct a settlement on the legatee and the issue of the marriage, *Clarke v. Parker*, 19 Ves. 1. (Williams on Executors, 10th Edn. p. 1026).

The word "approbation" has the same meaning as "consent", *Clarke v. Parker*, 19 Ves. 1.

Another question that arises for construction in connection with marriage is as to whether the bequest is vested or contingent. In each case it is a question of construction. If the marriage is an essential element of gift it will be contingent; if it is merely a desire the legacy will be vested. In *Kumar Chandra v. Prasanna*, 15 C. W. N. 121 (P. C.), a gift was to daughters on marriage and it was held to be not conditional. See, also, *Nagar Chandra v. Ratan Mala*, 15 C. W. N. 66.

Examples.

(1) A testator left property in trust for his children and declared that if any son or daughter should marry a person of any degree of kindred unless more remote than the third cousin his or her share should cease and determine. A daughter married a first cousin between the date of the will and the testator's death. *Held*: daughter had not forfeited her interest. The testator intended marriage to be marriage *after* his death, *Chapman v. Perkins*, (1905) A. C. 106. (See ill. vi., sec. 128).

(2) A testator devised his estate to his daughter subject to the condition that if she should marry a Scotchman, then she should forfeit all benefit under the will and the estate should go over. The daughter married a Scotchman. *Held*, the daughter forfeited the estate, *Ferrin v. Lyon*, 9 East. 170.

(3) A legacy is given to A when and so soon as he attained 18 or married before that age with consent of guardians, but if he should not attain 18 or if he should marry before that age without such consent, then to B. A, previously to attaining 18, married without consent, and afterwards attained 18. A is entitled to the legacy, *Austen v. Halsey*, 13 Ves. 125.

(4) A legacy is bequeathed to A to be paid at eighteen or marriage, but if A died under eighteen or married without B's consent, then to C. A married under eighteen without B's consent. *Held*, A forfeited the legacy, *Chauncy v. Graydon*, 2 Atk. 616. (Ill. iii., sec. 132).

NOTE:—The distinction between example 3 and example 4 is that in example 3 the condition is precedent to the vesting of the legacy upon the happening of one of

viz., marriage with consent, or attainment of 18, and the legacy vests if either contingency happens. In example 4 the condition is *subsequent*, the vested interest is to be determined if either of two events happens, *viz.*, his death before 18 or marriage without consent.

129. Where there is a bequest to one person and a bequest of the same thing to another, if the prior bequest shall fail the second bequest shall take effect upon the failure of the prior bequest although the failure may not have occurred in the manner contemplated by the testator.

Bequest to A and on failure of prior bequest to B.

Illustrations.

(i) A bequeaths a sum of money to his own children surviving him, and, if they all die under 18, to B. A dies without having ever had a child. The bequest to B takes effect.

(ii) A bequeaths a sum of money to B, on condition that he shall execute a certain document within three months after A's death, and, if he should neglect to do so, to C. B dies in the testator's lifetime. The bequest to C takes effect.

(This is sec. 116 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

(See next section).

130. Where the will shows an intention that the second bequest shall take effect only in the event of the first bequest failing in a particular manner, the second bequest shall not take effect, unless the prior bequest fails in that particular manner.

When second bequest not to take effect on failure of first

Illustration.

A makes a bequest to his wife, but in case she should die in his lifetime, bequeaths to B that which he had bequeathed to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him, the bequest to B does not take effect.

(This is sec. 117 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Sec. 129 lays down the English rule that what are apparent conditions precedent are nothing but mere conditional limitations and should be construed according to their substantial effect. In such cases the courts treat the intention of the testator as having been effectually fulfilled by regarding a clause of apparent condition as a clause of conditional limitation—a mere qualification annexed to the bequest—so as not to require as in the case of a gift on a condition that the very event must be strictly fulfilled, *e. g.*, if illustration (ii.) to sec. 129 is compared with illustration (vii.) to sec. 128, in both cases the bequest is made on a condition that legatee shall execute a document within a specified period. In ill. (vii.) to sec. 128, the condition is precedent and is required to be literally complied with. In ill. (iv.) to sec. 129, the condition is subsequent with a gift over and is treated as a conditional limitation so as to give effect to the gift over, *Avelyn v. Ward*, 1 Ves. Sen. 420.

Sec. 130 on the other hand is an exception to this rule, *viz.*, that condition subsequent should not be treated as a conditional limitation if the testator has expressed a contrary intention.

Examples.

(1) A Hindu made his son "Malik" of his property and provided "If after my death the said minor son dies, the mother shall become Malik," and after the widow the property was given to the daughters. Mother died before the son. *Held*: gift over to daughter took effect, *Durga Pershad v. Raghunandan*, 19 C. W. N. 439; *Radha Prashd v. Ranimony*, 33 Cal 947.

(2) A testator provided as follows:—"My wife is in the family way, should a son be born he shall be my heir on attaining proper age. In case my son dies minor my property shall go to my brother." The wife gave birth to a daughter. *Held*: gift to brother took effect. *Okhonymoney v. Nilmoney*, 15 Cal. 282. The wife proved not to have been pregnant. The gift over takes effect, *Jones v. Westcomb*, 1 Eq. Cas. Abr. 245.

(3) A testator gives a life interest to a woman if she so long remains unmarried and directs that in the event of her marrying the property should go to B. The woman dies unmarried. The gift over to B takes effect, *Eaton v. Hewitt*, 2 Dr. and Sm. 184.

(4) A makes a bequest to his wife, but in case she should die in his lifetime, bequeaths to B that which he had bequeathed to her. A and his wife perish together under circumstances which made it impossible to prove that she died before him. The bequest to B does not take effect, *Underwood v. Wing*, 4 De G. M. and G. 633. (Ill. sec. 130).

131. (1) A bequest may be made to any person with the condition superadded that, in case a specified uncertain event shall happen, the thing bequeathed shall go to another person, or that in case a specified uncertain event shall not happen, the thing bequeathed shall go over to another person.

Bequest over, conditional upon happening or not happening of specified uncertain event.

(2) In each case the ulterior bequest is subject to the rules contained in sections 120, 121, 122, 123, 124, 125, 126, 127, 129, and 130.

Illustrations.

(i) A sum of money is bequeathed to A, to be paid to him at the age of 18, and if he shall die before he attains that age, to B. A takes a vested interest in the legacy, subject to be divested and to go to B in case A dies under 18

(ii) An estate is bequeathed to A with a proviso that if A shall dispute the competency of the testator to make a will, the estate shall go to B. A disputes the competency of the testator to make a will. The estate goes to B

(iv) A sum of money is bequeathed to A and B, and if either should die during the life of C then to the survivor living at the death of C. A and B die before C. The gift over cannot take effect, but the representative of A takes one-half of the money, and the representative of B takes the other half.

(v) A bequeaths to B the interest of a fund for life, and directs the fund to be divided at her death equally among her three children, or such of them as shall be living at

her death. All the children of B die in B's lifetime. The bequest over cannot take effect, but the interests of the children pass to their representatives

(This is sec. 118 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Sections 131 to 137 deal with the subject of a bequest vested but liable to be divested on the happening of certain events. The first rule to be borne in mind is that if the bequest is of the whole of the interest of the testator, in other words, if the interest is absolute with conditions superadded such conditions are treated as repugnant and the absolute gift will prevail (sec. 138). It is only if the interest is limited that become divested under these sections. In ill. (i.) the interest is limited to the minority so that although A has a vested interest, during his minority he has not the full ownership to alienate or otherwise deal with it and once he attains majority the bequest becomes indefeasible and the gift over will not take effect. In ill. (ii.) the bequest to A cannot take effect until the will is proved and probate granted. Therefore, if he disputes the will, it can only be before the grant; for, after the grant, if A once receives the legacy he will be estopped from contending the will on the principle that he cannot accept the will for the purposes of his bequest and dispute the same for taking against it. Ills. (iii, iv. & v.) do not require any comment. In ill. (iv. & v.) the gift over cannot take effect because the legatees took a vested interest at the testator's death but the divesting contingency did not happen.

This section may be compared with section 134 and the illustrations. Under sec. 131 the divesting clause is coupled with a gift over. Under sec. 134 the divesting clause is single and it applies also to limited interest, see ill. (i.) & (v.) to sec. 134. Illustrations (ii., iii., & iv.), however, are not well expressed, for, if under those illustrations A has a vested interest in possession he may alienate the same and the cesser clause will be nugatory.

As to the construction of the defeasance clauses in wills the following rules are given in Jarman on Wills (6th Edn.,) p. 1365.

Firstly.—Property may be given to A subject to a proviso that in certain events A's interest shall cease or be defeated without regard to the ultimate destination of the property. In such a case if there is no gift over the property will fall into the residue or will go as on intestacy.

Secondly.—Property may be given to A subject to a proviso of defeasance or cesser by way of gift over to other persons in partial derogation of prior gift; in such a case the prior gift is affected to the extent of the gift over and if the latter fails the prior gift becomes absolute.

Thirdly.—Property may be given to A subject to a proviso showing the testator's intention to be that in a certain event A's interest shall cease or be defeated in favour of B. In such a case if the gift over to B is invalid or does not take effect A's interest becomes absolute.

For cases under this section see *Chunilal v. Bai Samrath*, 38 Bom. 399; *Purna Shashi v. Kalidhan*, 38 Cal. 603 (P. C.); *Bai Dhanlaxmi v. Hariprasad*, 45 Bom. 1038; *Radha Prasad v. Ranee Mani*, 33 Cal. 947.

Condition must be strictly fulfilled.

132. An ulterior bequest of the kind contemplated by section 131 cannot take effect, unless the condition is strictly fulfilled.

Illustrations.

(i) A legacy is bequeathed to A, with a proviso that, if he marries without the consent of B, C and D, the legacy shall go to E. D dies. Even if A marries without the consent of B and C, the gift to E does not take effect.

(ii) A legacy is bequeathed to A, with a proviso that, if he marries without the consent of B, the legacy shall go to C. A marries with the consent of B. He afterwards becomes a widower and marries again without the consent of B. The bequest to C does not take effect.

(iii) A legacy is bequeathed to A, to be paid at 18, or marriage, with a proviso that, if A dies under 18 or marries without the consent of B, the legacy shall go to C. A marries under 18, without the consent of B. The bequest to C takes effect.

(This is sec 119 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

This section is based on the rule that conditions which tend to the destruction of the estate already vested are to be construed strictly and shall not be extended beyond their words.

Condition as to residence.—In a condition of residence when no manner or period is prescribed, exclusive residence is not supposed to be meant and the occasional use of the house and keeping an establishment is a sufficient compliance, *Tagore v. Tagore*, 14 B. L. R. 60, 1 I. A. 387; *In re Moir, Warner v. Moir*, L. R. 25 Ch. D. 605; *Bhoba Tarini v. Peary Lall*, 24 Cal. 646; *Mulji v. Bai Ujam*, 13 Bom. 218.

Original bequest not affected by invalidity of second.

133. If the ulterior bequest be not valid, the original bequest is not affected by it.

Illustrations.

(i) An estate is bequeathed to A for his life with condition superadded that, if he shall not on a given day walk 100 miles in an hour, the estate shall go to B. The condition being void, A retains his estate as if no condition had been inserted in the will.

(ii) An estate is bequeathed to A for her life and, if she do not desert her husband, to B. A is entitled to the estate during her life as if no condition had been inserted in the will.

(iii) An estate is bequeathed to A for life, and, if he marries, to the eldest son of B for life. B, at the date of the testator's death, had not had a son. The bequest over is void under section 105, and A is entitled to the estate during his life.

(This is section 120 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Under sections 126 & 127 if a bequest is made upon a condition which is impossible, illegal, or immoral, the whole gift is void. Those sections treat of conditions precedent. This section deals with a condition subsequent and enacts that if a condition subsequent is impossible, illegal, or immoral, the condition is discarded and the gift is single and good, *Anandrao v. Adm.-General*, 20 Bom. 450; *Lalit Mohun v. Chukkun Lal*, 24 Cal. 834 (P. C.).

Bequest conditioned that it shall cease to have effect in case a specified uncertain event shall happen, or not happen.

134. A bequest may be made with the condition superadded that it shall cease to have effect in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations.

(i) An estate is bequeathed to A for his life, with a proviso that, in case he shall cut down a certain wood, the bequest shall cease to have any effect. A cuts down the wood. He loses his life-interest in the estate.

(ii) An estate is bequeathed to A, provided that, if he marries under the age of 25 without the consent of the executors named in the will, the estate shall cease to belong to him. A marries under 25 without the consent of the executors. The estate ceases to belong to him.

(iii) An estate is bequeathed to A, provided that, if he shall not go to England within three years after the testator's death, his interest in the estate shall cease. A does not go to England within the time prescribed. His interest in the estate ceases.

(iv) An estate is bequeathed to A, with a proviso that, if she becomes a nun, she shall cease to have any interest in the estate. A becomes a nun. She loses her interest under the will.

(v) A fund is bequeathed to A for life, and, after his death, to B, if B shall be then living, with a proviso that, if B shall become a nun, the bequest to her shall cease to have any effect. B becomes a nun in the life-time of A. She thereby loses her contingent interest in the fund.

(This is sec. 121 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57 i e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

This section is a departure from English Law, viz., that a gift may be made coupled with a condition that on the happening or not happening of a specified uncertain event it shall cease, and that to effectuate the defeasance a gift over is not necessary as required by English Law. According to this section if the condition subsequent is valid, if accompanied by a gift over, it will be equally valid without the gift over. In England it is treated as *in terrorem*. In *Veerabhadra v. Chiranjivi*, 28 Mad. 173 (P. C.), a condition was that the legatee shall humbly apply for subsistence allowance. The legatee wrote a letter to the executors demanding the legacy. It was held that the condition was not satisfied. In *Gulboji v. Rustomji*, 49 Bom. 478, a Parsi gave a certain property to his son B "as a gift" and he directed that should B die leaving a son such son should be the owner. Should he leave no children then over. It was held that B took a life interest. In *Navalchand v. Nanekchand*, 23 Bom. L. R. 450, a testatrix bequeathed her property to her daughter's son but the devisee was not to get the full ownership until he had a son

or daughter 20 years old and if he died without children then over. It was held that the son took an absolute interest liable to be defeated if he died without ever having a son or daughter.

135. In order that a condition that a bequest shall cease to have effect may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of a bequest as contemplated by section 120.

Such condition must not be invalid under section 120.

(This is sec. 122 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

To render valid a cesser clause and to divest the estate already vested, the condition contemplated shall be such a one as can be legally given effect to. The reference to sec. 120 is not quite intelligible, but it probably means that the contingency upon which the estate is made determinable must occur within the legal period, e. g., perpetuity, *Anandrao v. Adm.-General*, 20 Bom. 450.

136. Where a bequest is made with a condition superadded that, unless the legatee shall perform a certain act, the subject-matter of the bequest shall go to another person, or the bequest shall cease to have effect but no time is specified for the performance of the act; if the legatee takes any step which renders impossible or indefinitely postpones the performance of the act required, the legacy shall go as if the legatee had died without performing such act.

Result of legatee rendering impossible or indefinitely postponing act for which no time specified, and on non-performance of which subject-matter to go over.

Illustrations.

(i) A bequest is made to A, with a proviso that, unless he enters the Army, the legacy shall go over to B. A takes Holy Orders, and thereby renders it impossible that he should fulfil the condition. B is entitled to receive the legacy.

(ii) A bequest is made to A, with a proviso that it shall cease to have any effect if he does not marry B's daughter. A marries a stranger and thereby indefinitely postpones the fulfilment of the conditions. The bequest ceases to have effect.

(This is sec. 123 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

(See next section).

137. Where the will requires an act to be performed by the legatee within a specified time, either as a condition to be fulfilled before the legacy is enjoyed, or as a condition upon the non-fulfilment of which the subject-matter of the bequest is to go over to another person or the bequest is to cease to have effect, the act must be performed within the

Performance of condition, precedent or subsequent, within specified time. Further time in case of fraud

specified, unless the performance of it be prevented by fraud, in which case such further time shall be allowed as shall be requisite to make up for the delay caused by such fraud.

(This is sec. 124 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Time within which the condition must be fulfilled.—Where no time is

No time specified. specified for the performance of the act, in case where the condition is precedent, the condition must be fulfilled within a reasonable time. As to what is reasonable time will depend on the facts of each case. But where the condition is subsequent or is superadded that, unless the legatee shall perform a certain act, the subject matter of the bequest shall go to another person, or the bequest shall cease to have effect, if the legatee takes any step which renders impossible or indefinitely postpones the performance of the act required, he forfeits the legacy.

If the condition is precedent and the will specifies a time within which the condition must be fulfilled the legatee will forfeit the legacy, When time is specified. if he fails to perform the condition within the time specified. For example, where the condition requires that the legatee should execute a release within a certain time, and a release is, in fact, executed within a reasonable time but not within the time specified, the legatee will forfeit the legacy. (III. vii., sec. 128). According to English cases the rule is otherwise. There, if the release is in fact executed within a reasonable time, the legatee will be entitled to the legacy on the principle that the period for executing the release was merely ancillary to the accomplishment of the object, and the procurement of that instrument was the end and substance of the condition, *Taylor v. Popham*, 1 Bro. C. C. 168. (Williams on Executors, 10th Edn., p. 1013). But where there is a condition precedent to the vesting of the interest of the legatee and on his failing to perform the condition within the time specified, the property is given over, that condition must be complied with strictly. This is in accordance with the Succession Act.

The executor owes no duty to the legatee to give notice of the terms of the legacy even though he takes a beneficial interest in the legacy on the breach of the condition, *Re Lewis*, (1904) 2 Ch. 656. Where, therefore, the will requires an act to be performed by the legatee within a specified time either as a condition precedent or as a condition subsequent, the act must be performed within the time specified whether he knows of the condition or not, unless the performance of the act be prevented by fraud, in which case such further time shall be allowed as shall be requisite to make up for the delay caused by such fraud. Mere ignorance on the part of the legatee is no excuse, the principle being that a person who takes by gift under a will cannot plead want of knowledge as an excuse for not complying with its provisions, *Astley v. The Earl of Essex*, L. R. 18 Eq. 290.

Example

A testatrix gave legacies to A, B, and C, and declared that if any of them should be dead at her decease, or should not be heard of, or should not claim the legacies within twelve months after her death, the legacies should sink into the residue. Three years after the death of the testatrix C who had not been heard of claimed the legacy. It was contended on

C's behalf that C was ignorant that the testatrix was dead and the executors had not informed C of the terms of the legacy. *Held*, C was not entitled, *Hawkes v. Baldwin*, 9 Sim 355. The principle is that a person who takes by gift under a will cannot plead want of knowledge of the contents of the will as an excuse for not complying with its provisions. The performance of the condition is not affected by the ignorance of the legatee; and the executor owes no duty to the legatee to give notice of the terms of the legacy, even though he takes a beneficial interest in the legacy on the breach of the condition, *Re Lewis*, (1904) 2 Ch. 656. (Williams on Executors, 10th Edn., p. 1014, foot-note i).

CHAPTER XII.

Of Bequests with Directions as to Application or Enjoyment.

138. Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction.

Direction that fund be employed in particular manner following absolute bequest of same to or for benefit of any person.

Illustration.

A sum of money is bequeathed towards purchasing a country residence for A, or to purchase an annuity for A, or to place A in any business. A chooses to receive the legacy in money. He is entitled to do so.

(This is sec. 125 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i.e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

This section is based on the principle that a legatee ought not to be compelled by the court to do that which he may undo the next moment, *Edwards v. Hall*, 11 Hare, 6; *Jehangir v. Kaikhusru*, 39 Bom. 296 (P. C.); and that an unqualified gift will not be cut down by subsequent words unless they clearly have that effect, *Tripurari v. Jagat Tarini*, 40 I. A. 37.

In the words of Lord Cottenham in *Lassence v. Tierney* (1 Mac. & G. 551), *Lassence v. Tierney*. "If a testator leave a legacy absolutely as regards his estate but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails. But if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it. In the latter case the gift is only for a particular purpose; in the former the purpose is the benefit of the legatee as to the whole amount of the legacy, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator's estate, but already the property of the legatee," *Kellet v. Kellet*, L. R. 3 H. L. 160. But where there is no absolute gift, the legatees can take no more than is given, *Savage v. Tyers*, (1872) 7 Ch. App. 356.

On the same principle where a legacy is given for a particular purpose for the benefit of the legatee, e. g., to bind him apprentice (*Barlow v. Grant*, 1 Vern. 255), or to pay off a mortgage (*Lockhart v. Hardy*, 9 Beav. 379), or for maintenance and education (*Webb*

Legacy given for a particular purpose.

v. *Kelly*, 9 Sim. 469), it is good though the purpose fails or becomes incapable of execution, and the legacy will not be cut down to the amount actually required for the named purpose, unless the surplus, after satisfying that purpose, is expressly given over, *Adm.-General v. Apcar*, 3 Cal. 553. So also if a bequest is made to legatees but the division is restrained for a number of years the restriction is void as being a condition repugnant to the gift, *Mokoondo v. Gonesh Chunder*, 1 Cal. 104; *Gordhandas v. Ramcoover*, 26 Bom. 449; *Putlibai v. Sorabji*, 25 Bom. L. R. 1099 (P. C.) at 1101; *Adm.-General v. Money*, 15 Mad. 448; *Cally Nath v. Chunder Nath*, 8 Cal. 379; *contra, Profulla v. Jagendra*, 9 C. W. N. 528. Where some of the terms of the will seem to show that an absolute gift was intended but the subsequent clauses show that only a life interest was intended, the last mentioned words instead of being regarded as repugnant will be construed that a life estate was intended, *Somasundara v. Ganga*, 28 Mad. 386. On the same principle when property is given to a wife for the support of herself and the children it is given for her benefit and her children and the court does not inquire how it is applied unless the children are not supported at all. But when the children are otherwise provided for and do not require support or maintenance they are not entitled to complain that they do not receive a portion of the fund which is not required for their maintenance, education and support, *Carr v. Living*, 28 Beav. 644 at 647; *Narayani v. Adm.-General*, 21 Cal. 683 at 696, and if the children attain majority the obligation to maintain ceases, *Natha Kerra v. Dhunbaiji*, 23 Bom. L. R. 1. Though the section speaks of a "fund" the rule embodied in this section applies to moveable as well as immoveable property, *Mokoondo v. Gonesh*, *supra*; *Putlibai v. Sorabji*, *supra*.

Examples

(1) A Hindu by his will provided, "If I die then my son's wife G is the owner. G shall during her life spend, use and enjoy and as to whatever may remain over after her death her two daughters are the owners. *Held*, G took an estate for life with power of disposal during her life, *Mafutlal v. Kanialal*, 17 Bom. L. R. 705.

(2) A testator bequeathed a portion of his property to his son and provided that if the son died without marrying or if married without any lineal heir his share should go to his sisters or their heirs. *Held*, the son took absolutely and the restrictions were nugatory, *Sardar Nowroji v. Putlibai*, 15 Bom. L. R. 352.

(3) A Hindu devised his property to his daughter and provided that she and her husband "should live in my house and maintain themselves and enjoy it but her Sasarias (relations of her husband) or her creditors have no right and if any issue be born it is the owner. *Held* daughter took absolutely and the provisions were nugatory, *Chunilal v. Bhogilal*, 19 Bom. L. R. 930.

(4) A testator devised his estate, should his wife remain his widow, for the benefit of his wife and his children then living and any children that may be born to him of his said wife thereafter. He also provided that should his wife remain his widow, she should have a full life-interest in the estate, but that after her death her children and their descendants should take *per stirpes*, and in the event of his wife not remaining his widow and her child or children being living, then to his children in equal shares. And in the event of his wife contracting a second marriage, and his children dying before such marriage and without children, his wife should take half of his estate and the testator's brothers the other half. The testator's wife remained his widow until her death, her children having all predeceased her without being married. *Held*, that the intention of the testator by the first devise was to give an absolute estate to his wife and children jointly, and that the remaining clauses of the will were merely intended to restrict the mode in which they were to enjoy the gift, *Haliburton v. Administrator-General of Bengal*, 21 Cal. 488.

Property and Power.—A gift to be at the disposal of A is an absolute gift, *Kellett v. Kellett*, 3 H. L. 160. So also, if there is a gift to A in general terms, a superadded power to dispose of the property in question by will, or at the donee's death, does not cut down the absolute gift, *Southouse v. Bate*, 16 Beav. 132. And even a superadded power to dispose of the property among a particular class will not cut down the absolute interest previously given, *Howorth v. Dewell*, 29 Beav. 18. But if the gift is to A for life, with a superadded power to dispose of the whole for his own benefit, A takes only a life interest if he does not exercise the power. (See *Archibald v. Wright*, 9 Sim. 161 and other cases cited at p. 482, Theobald on Wills, 7th Edn.)

139. Where a testator absolutely bequeaths a fund, so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit for the legatee; if that benefit cannot be obtained for the legatee, the fund belongs to him as if the will had contained no such direction.

Direction that mode of enjoyment of absolute bequest is to be restricted, to secure specified benefit for legatee.

Illustrations

(i) A bequeaths the residue of his property to be divided equally among his daughters, and directs that the shares of the daughters shall be settled upon themselves respectively for life and be paid to their children after their death. All the daughters die unmarried. The representatives of each daughter are entitled to her share of the residue.

(ii) A directs his trustees to raise a sum of money for his daughter, and he then directs that they shall invest the fund and pay the income arising from it to her during her life, and divide the principal among her children after her death. The daughter dies without having ever had a child. Her representatives are entitled to the fund.

(This is sec 126 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

This section embodies the rule in *Lassence v. Tierney*, (1 Mac. & G. 551) quoted in section 138. It is a corollary to sec. 138; in order to entitle the legatee to the bequest it must be absolute and severed. In *Soundararajan v. Natarajan*, 44 Mad. 446 this rule was followed and it was held that as the object of the testator to settle the property for the benefit of his grand children (by his daughter) failed as they were not born the daughters took absolutely. See, also, *In re Hancock, Watson v. Watson*, (1901) 1 Ch. 482, (1902) A. C. 14.

140. Where a testator does not absolutely bequeath a fund, so as to sever it from his own estate, but gives it for certain purposes, and part of those purposes cannot be fulfilled, the fund, or so much of it as has not been exhausted upon the objects contemplated by the will, remains a part of the estate of the testator.

Bequest of fund for certain purposes, some of which cannot be fulfilled.

Illustrations.

(i) A directs that his trustees shall invest a sum of money in a particular way, and shall pay the interest to his son for life, and at his death shall divide the principal am

his children. The son dies without having ever had a child. The fund, after the son's death, belongs to the estate of the testator.

(ii) A bequeaths the residue of his estate, to be divided equally among his daughters with a direction that they are to have the interest only during their lives, and that at their decease the fund shall go to their children. The daughters have no children. The fund belongs to the estate of the testator.

(This is sec. 127 of the Succession Act X of 1885. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Gift Beneficial or In Trust.—On the question whether a gift is beneficial or in trust, the English cases are numerous. But the tendency of the modern decisions is not to construe doubtful words into a declaration of trust merely because the testator expresses a "wish," "desire," "confidence," "recommendation," "request," or "direction." Trusts created by such words are usually called precatory trusts. In the case of *Lamb v. Eames*, L. R. 6 Ch. App. 597, Lord Justice James said, "In hearing case after case cited I cannot help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts must have been a very cruel kindness," and in *Re Adams and Kensington Vestry*, 24 C. D. 199 27 Ch. D. 394. Lord Justice Cotton expressed, "I have no hesitation in saying myself that I think some of the older authorities went a great deal too far in holding that some particular words in a will were sufficient to create a trust."

A gift to a person for some particular purpose, whether declared or not, creates a trust, *Corporation of Gloucester v. Osborn*, 1 H. L. 272. But in order that the Court may imply a trust the property to be subject to and the objects to be benefited must be sufficiently certain. "The rules are clear with respect to the doctrine of precatory trusts that the words of gift must be such that the Court finds them *imperative* on the first taker of the property and that the subject of the gift over be *well defined* and *certain*. If there is uncertainty as to the *amount or nature of the property* that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust, because the Court does not know upon what property to lay its hands but the uncertainty in the subject of the gift has a reflex action upon the previous words and throws doubt on the intention of the testator and seems to show that he could not possibly have intended his words of confidence, hope, etc.—his appeal to the conscience of the first taker—to be imperative words", *Mussoorie Bank v. Raynor*, 4 All. 500 (P. C.); 9 I. A. 70; *Coriskey v. Bowring-Hanbury*, (1905) A. C. 84; *Adm.-General v. Lazar*, 4 Mad. 244; *Natha v. Dhunbaiji*, 23 Bom. 1.

Therefore, mere expressions of a desire that the donee will be kind to, remember, or do justice to, a certain class of persons will raise no trust. Also, if the donee has a wide discretion as to the objects to be benefited, *e.g.*, where there is absolute power of disposal or words of indefinite gift followed by a "desire", or "recommendation", or "confidence" that the donee will, at his decease, dispose of the property amongst a particular class of persons, that will not create a trust. No trust will be implied from precatory words:—

(a) Where the donee may, at his discretion, apply the property to other purposes,

- (b) Or, where there is an express direction that the donee's absolute interest is not to be curtailed.
- (c) Or, where the precatory words are stated to be not obligatory.
- (d) Or, where the donee is to take free and unfettered. (Theobald on Wills, 7th Edn., p. 491).

If there is a gift *subject* to trusts, the donee takes whatever is not required for the performance of those trusts, *Dawson v. Clarke*, 15 Ves. 409; 18 Ves. 247. But if the gift is *upon trust*, the donee holds the property for the purposes declared and if they fail the property goes to the residuary legatee or the next-of-kin of the donor if the donor dies testate or intestate as the case may be.

Distinction between
a gift subject to trusts
and a gift upon trusts.

Examples.

(1) A Hindu by his will, after appointing executors, gave the following directions.—“You should give my brothers, their wives, and children according to your wishes. *Held* that no trust was created by these words, *Kumarasami v. Subbaraya*, 9 Mad. 325.

(2) A testator gave all his property to his wife “absolutely with full power to her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so,” *Held*, wife took absolutely, *In re Hutchinson and Tennant*, (1878) 8 Ch. D. 540.

(3) A testator gave his property to his son G that the same be “dealt with according as he may think proper and when the sons of my son shall attain 21 the same shall be divided between G and his sons in equal shares” *Held*, G took absolutely and there was no trust in favour of his sons, *Anandrao v. Adm. General*, 20 Bom. 450; *Purmanundas v. Venayekrao*, 9 I A. 86.

(4) A bequest is made to A with request that he should distribute it amongst such members of the family of B as he should think most deserving. *Held*, no trust was created, as the objects of the trust were not clearly indicated, *Green v. Marsden*, 1 Drew. 646; *Johnston v. Rowlands*, 2 De G. & Sm. 356.

(5) A testator bequeaths his land to his brother “from generation to generation and for ever” with power to alienate by sale, etc., but directs that his brother should enjoy the land jointly with the testator's wife. *Held*, brother not entitled to alienate during the widow's lifetime and that the direction contained in the latter part was not invalid, *Periya v. Narayana*, 23 Mad. 256.

Secret Trust.—There are cases where no trust appears on the face of the will, but it appears that the testator has been induced to make the will or, having made it, has been induced not to revoke it by a promise on the part of the legatee to deal with the property in a specified manner; in these cases questions arise whether evidence of such trust can be admitted and it has been held in a number of cases that the trust will be binding on the conscience of the legatee. The legatee will be treated as a trustee and will be compelled to carry out the instructions so confided to him, *McCormick v. Grogan*, L. R. 4 H. L. 82. But in order to make the trust binding two things are essential.

(1) That it shall be communicated to the legatee in the testator's lifetime.

(2) That there has been an acceptance of the trust by the legatee, *Re Boyes*, 26 Ch. D. 531.

Evidence of the trusts may be given if they have been communicated at, before, or even subsequent to the making of the will, *Re Fleetwood*, 15 C. D. 594; *Riordan v. Banon*, 10 I. R. Eq. Rep. 469; *Moss v. Cooper*, 1 J. & H. 352; *Smith v. Attersoll*, 1 Russ. Chanc. Cas. 266. (Williams on Executors 10th Edn., p. 1224). The onus lies on the party setting up the secret trust to prove that it was communicated by the testator to the legatee and that the legatee agreed to accept the property bequeathed on the terms of the trust, *Kali Charan v. Ram Chandra*, 30 Cal. 783.

This rule of English equity is made applicable to India under sec. 5 of the Indian Trusts Act II of 1882, *Manuel v. Jnana*, 31 Mad. 187. In *Richard Taylor v. Raja of Parlakimedi*, 32 Mad. 443, a testator bequeathed certain property to a legatee and at the same time wrote a letter to the legatee containing directions how the property was to be disposed of, but the letter was not communicated to the legatee. The legatee died after the testator. It was held that the letter, not having been communicated to the legatee in the testator's lifetime, did not operate to create a trust and also that the letter was not admissible to show that the legatee was not intended to take a beneficial interest. The Court will impose a trust on a legatee only when there is fraud according to English law, *Kali Charan v. Ram Chandra*, 30 Cal. 783.

Example.

A testator in his will wrote as follows:—"In accordance with the directions that I am going to give in private to trustee No. 1 out of the trustees appointed by me my trustees should entrust to Haridas Rs. 5,000 out of my policy moneys and the shares of Tata Co., also should also be transferred to the person whose name will be disclosed to Haridas" Held: Haridas was bound to disclose the private directions given to him by the testator and evidence was admissible, *Bayabai v. Haridas*, 40 Bom. 1.

CHAPTER XIII.

Of Bequests to an Executor.

Legatee named as executor cannot take unless he shows intention to act as executor

141. If a legacy is bequeathed to a person who is named an executor of the will, he shall not take the legacy unless he proves the will or otherwise manifests an intention to act as executor.

Illustration.

A legacy is given to A, who is named an executor. A orders the funeral according to the directions contained in the will, and dies a few days after the testator, without having proved the will. A has manifested an intention to act as executor.

(This is sec. 128 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Where a legacy is given to a person in the character of an executor and not as a mark of personal regard only the bequest is conditional and the legatee is not entitled to the legacy unless he proves the will, or otherwise manifests his intention to act as executor. It is a conditional bequest, the condition being a condition

precedent and unless the condition is fulfilled the legacy does not vest. The legacy is *prima facie* given to him for his trouble and if the legatee refuses the office of executor he is not entitled to it.

When a legacy is given to a person who is named as an executor the presumption is that the legacy is given to him in that character, and if he wishes to repel that presumption the onus will be on him to do so. In *re Howell, Liggins v. Buckingham*, (1914) 2 Ch. 173. Under sec. 141 it is even doubtful whether the Court would admit parol evidence to rebut the presumption that the legacy was given to him in the character of an executor but as a mark of personal regard only, *i e.*, whether the legatee accepts the office or not he is entitled to the legacy beneficially, see *Prosono Coomar v. Administrator-General*, 15 Cal. 83, where the Court refused to admit parol evidence. In this case although the executor had not proved the will, it was held that he had manifested a sufficient intention to act as an executor and was entitled to the legacy.

According to the English cases if a legacy is given to an executor who is named as one after the death of a tenant for life (*Re Reeve's Trusts*, (1873) 4 Ch. D. 841), or where there is a motive expressed, as a gift to "my friend and executor" (*Re Denby*, 3 De. G. F. & J. 350, see *contra Reed v. Devaynes*, 3 Bro. C. C. 95), or where the gift is of residue (*Christian v. Devereux*, 12 Sim. 264), that is sufficient to rebut the presumption.

What is a sufficient assumption of the office to satisfy the condition.— If the legatee proves the will with an intention to act under it, that is sufficient. But the mere fact of proving the will would not be sufficient if the legatee had not the *bona fide* intention of administering the estate, but he merely procured the probate to enable him to violate in the grossest manner the confidence reposed in him by the testator, *Harford v Browning*, 1 Cox, 302. If the legatee gives directions about the funeral of the testator and is prevented by death from further entering upon his office, that is sufficient, *Harrison v. Rowley*, 4 Ves. 216.

If the executor is abroad and sends a power of attorney, that is sufficient, *Lewis v. Mathews*, L. R. 8 Eq. 277.

Where an executor requests the Administrator-General to act, it is doubtful whether he would be entitled to the legacy.

Where an annuity is given to an executor for his trouble it ceases when the duties cease, *Hall v. Christian*, 17 Eq. 546.

If a legacy is given to an infant as executor he is only entitled to the legacy, if on attaining majority he accepts the office, *Re Gardner*, 67 L. T. 552.

CHAPTER XIV.

Of Specific Legacies.

Specific legacy defined. 142. Where a testator bequeaths to any person a specified part of his property, which is distinguished from all other parts of his property, the legacy is said to be specific :

not at the time of his death belong to the testator or is converted into property of another kind, in other words if the legacy is *adeemed*, the specific legatee will not be entitled to any recompense or satisfaction out of the general estate.

As regards demonstrative legacies they have an advantage over both the kinds of legacies, general and specific. If the fund or source demonstrated fails wholly, or in part, or is not in existence at the testator's death, the demonstrative legacies are, to the extent that the fund out of which they are payable fails, payable out of the general assets, but if the general assets are not sufficient to pay all the legacies they will abate with the general legacies, (sec. 329). A demonstrative legacy resembles a specific legacy in this, that so long as the fund out of which the legacy is directed to be paid is in existence, it will not be liable to abate with general legacies upon a deficiency of assets. It is liable to abate only when it becomes a general legacy by reason of the failure of the fund. The distinction between a specific legacy and demonstrative legacy is this, that where a specified property is given to the legatee the legacy is specific; but where the legacy is directed to be *paid out* of specified property it is demonstrative. (Exp. sec. 150). In general, a legacy payable out of property, real or personal, is demonstrative. A demonstrative legacy differs from a specific legacy in this, that it is not *adeemed* by reason that the property on which it is charged by the will does not exist at the time of the death of the testator or is converted into property of another kind, as would be the case in the case of a specific legacy, but the whole or such part of it as shall not have been satisfied out of the fund demonstrated shall be payable out of the general estate of the testator, (sec. 329). A demonstrative legacy, however, will not be payable out of the general assets of the testator, if there are directions to the contrary made by the testator in the will, *Chinnam v. Tadikonda*, 29 Mad. 155.

(2) Again, in case of a specific bequest to two or more persons in succession the property specifically bequeathed should be retained in the same form, though it be of a wasting nature and notwithstanding that there is a danger that one object of the testator's bounty will be defeated by the tenancy for life lasting as long as the property enures. But if the property is not specifically bequeathed but is a general bequest to two or more persons in succession, and if the property is of a wasting nature then the rule is that it is to be converted into permanent property, in other words, it must be invested in authorized securities. This is known as the *Rule in Howe v. Lord Dartmouth*, 7 Ves. 137.

(3) A specific legacy carries income or interest from the testator's death, (sec. 349). A general legacy carries interest from the expiration of one year after the testator's death, sec. 351.

(4) A specific legatee takes the bequest subject to all incumbrances existing at the death of the testator and clear the incumbrance (sec. 167).

Examples.

(1) Every devise of land, is specific, *Forrester v. Leigh*, Amb 171; *Hensman v. Fryer*, (1867) L. R. 3 Ch App. 420 (Ill. ex., sec. 142). Also a devise of land to be sold and divided among certain persons makes them specific legatees, *Page v. Leapingwell*, 18 Ves. 463. (Ill. iv., last illustration). A bequest of a rent out of a term of years is specific, *Long v. Short*, 1 P. Wms. 403. But if the apparent intention of the testator is to give an annuity at all events

the legacy is general, though it be directed to be paid out of the rents of a property. (Ill. ii., sec. 150). But if the immoveable property is charged with an annuity the bequest will be specific. (Ill. i., sec. 142). A mere gift, however, of a legacy to be paid out of or charged on immoveable property will not be specific. (Ill. iii., sec. 150).

(2) A bequest of rent-producing property to the trustees on trust to apply the rents and profits for the benefit of a legatee is not a specific bequest as the rents and profits are liable to fluctuate, *Bai Bhikaji v. Bai Dinabai*, 13 Bom. L. R. 319.

(3) A bequest of all the residue of the testator's property is not specific merely because the residuary clause contains an enumeration of some items of property of which it may consist (Sec. 146). A debt due to the testator may be specifically bequeathed, e. g., "the debt which B owes me" or "my mortgage on Rampur factory." (Ill. i., sec. 142). But if the legacy is given out of a debt due to the testator from a third person it will be demonstrative. (Ill. i., sec. 150). If the bequest of the debt is specific and the testator recovers the same in his lifetime, the legacy will be adeemed and if a part of the debt is recovered, the legacy will be adeemed to that extent. (Secs. 154, 155).

143. Where a certain sum is bequeathed, the legacy is not specific merely because the stock, funds or securities in which it is invested are described in the will.

Bequest of certain sum where stocks, etc., in which invested are described

Illustration.

A bequeaths to B—

"10,000 rupees of my funded property":

"10,000 rupees of my property now invested in shares of the East Indian Railway Company".

"10,000 rupees, at present secured by mortgage of Rampur factory":

No one of these legacies is specific.

(This is sec. 130 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

(See sec. 145.)

144. Where a bequest is made in general terms of a certain amount of any kind of stock, the legacy is not specific merely because the testator was, at the date of his will, possessed of stock of the specified kind, to an equal or greater amount than the amount bequeathed.

Bequest of stock where testator had, at date of will, equal or greater amount of stock of same kind.

Illustration.

A bequeaths to B 5,000 rupees five per cent. Government securities. A had at the date of the will five per cent. Government securities for 5,000 rupees. The legacy is not specific.

(This is sec. 131 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act)

COMMENTARY.

(See sec. 145.)

Bequest of money where not payable until part of testator's property disposed of in certain way.

145. A money legacy is not specific merely because the will directs its payment to be postponed until some part of the property of the testator has been reduced to a certain form, or remitted to a certain place.

Illustration.

A bequeaths to B 10,000 rupees and directs that this legacy shall be paid as soon as A's property in India shall be realised in England. The legacy is not specific.

(This is sec 132 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

A legacy of quantity is ordinarily a general legacy, though the stock, funds, or securities in which it is invested are described in the will. But wherever there is a clear reference to the *corpus* of the stock or securities the bequest is specific. For example, the word "my" preceding the word "stock" or "fund" has been held sufficient to render the legacy specific. (Ill. i, sec. 142).

A money legacy is not specific merely because the testator had at the date of the will the exact or greater amount of stock or securities in his possession, nor is a money legacy specific merely because the will directs its payment to be postponed until some part of the property of the testator is reduced to a certain form or remitted to a certain place. If, however, it clearly appears from the context that the testator meant to bequeath the *identical stock* or the *identical money*, that will render the legacy specific, e. g., "all my shares in the Bank of Bengal," or "all the Government securities I shall be entitled to at the time of my decease" (Ill. i., sec. 142 last lines), or "a certain sum of money in a certain bag or chest," *Lawson v. Stitch*, 1 Atk. 508. But a legacy of Rs. 2,000 to be paid to A in cash or Rs. 10,000 worth of Government securities to be given to A is a general legacy. (Ill. vi., sec. 142).

Also a legacy of money to procure a specified object for the legatee, as a sum to buy a house or to buy a ring is a general legacy. (Ill. vi., sec. 142). Again, where sums of money are bequeathed by a testator who has property in England and India to persons resident in each place, with a direction that they shall be paid out of the assets in the respective countries, such a direction will not constitute the legacies specific. (Ill. vii., sec. 142).

The test to try whether a bequest is or is not specific is to inquire what would be the result if there had been pecuniary legacies with a deficient fund or a necessity for a sale for payment of debts, i. e., to inquire whether or not in such a case the bequest would have been protected in competition with the clauses of pecuniary legatees, *Norman v. Norman*, (1919) 1 Ch. 297.

146. Where a will contains a bequest of the residue of the testator's property along with an enumeration of some items of property not previously bequeathed, the articles enumerated shall not be deemed to be specifically bequeathed.

When enumerated articles not deemed specifically bequeathed.

(This is sec. 133 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

A general residuary clause merely because it enumerates some properties specifically will not be construed as constituting specific legacies of the articles enumerated, see *Taylor v. Taylor*, 6 Sim. 246; *Fielding v. Preston*, 1 De G. & J. 438. But if the specific articles enumerated in the residuary gift are distinguished by such words as "as well as" "together with" or "and also" the gift will be specific, *Fitzwilliam v. Kelly*, 10 Hare, 274; *Mills v. Brown*, 21 Beav. 1.

147. Where property is specifically bequeathed to two or more persons in succession, it shall be retained in the form in which the testator left it, although it may be of such a nature that its value is continually decreasing.

Retention, in form, of specific bequest to several persons in succession.

Illustrations

(i) A, having lease of a house for a term of years, fifteen of which were unexpired at the time of his death, has bequeathed the lease to B for his life, and after B's death to C. B is to enjoy the property as A left it, although, if B lives for fifteen years, C can take nothing under the bequest.

(ii) A, having an annuity during the life of B, bequeaths it to C, for his life, and, after C's death, to D. C is to enjoy the annuity as A left it, although, if B dies before D, D can take nothing under the bequest.

(This is sec. 134 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

148. Where property comprised in a bequest to two or more persons in succession is not specifically bequeathed, it shall, in the absence of any direction to the contrary, be sold, and the proceeds of the sale shall be invested in such securities as the High Court may by any general rule authorise or direct, and the fund thus constituted shall be enjoyed by the successive legatees according to the terms of the will.

Sale and investment of proceeds of property bequeathed to two or more persons in succession.

Illustration.

A, having a lease for a term of years, bequeaths all his property to B for life, and after B's death, to C. The lease must be sold, the proceeds invested as stated in this section and the annual income arising from the fund is to be paid to B for life. At B's death the capital of the fund is to be paid to C.

(This is sec. 135 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

These sections lay down the rule in *Howe v. Lord Dartmouth*, 7 Ves. 137. (See *supra* p. 190).

Where deficiency of assets to pay legacies, specific legacy not to abate with general legacies.

149. If there is a deficiency of assets to pay legacies, a specific legacy is not liable to abate with the general legacies.

(This is sec. 138 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 67, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Order of Payment.—When there is a *specific bequest* of a portion of a fund and also a legacy directed to be *paid out* of that fund (demonstrative), then the order for payment is as follows:—

- (1) The specific bequest must be paid first.
- (2) Out of the residue the demonstrative legacy should be paid.
- (3) If the residue is not sufficient to pay the demonstrative legacy in full, the rest of the demonstrative legacy must be made good out of the general assets of the testator. (See also secs. 328 to 331).

CHAPTER XV.

Of Demonstrative Legacies.

150. Where a testator bequeaths a certain sum of money, or a certain quantity of any other commodity, and refers to a part of a fund or stock so as to constitute the *entire* primary fund or stock out of which payment is to be made, *any shares* is said to be demonstrative.

Demonstrative legacy defined.

Explanation.—The disposition of money in a *will* a specific legacy and a demonstrative legacy consists of Rs. 2,000 to be paid to be given to A is a general legacy where specified property is *specific* ;

where the legacy is directed to be paid *object for* of specified property, it is demonstrative. (III. has pr that th

Illustrations.

(i) A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. The legacy to B is specific, the legacy to C is demonstrative.

(ii) A bequeaths to B—

“ten bushels of the corn which shall grow in my field of Green Acre”;

“80 chests of the indigo which shall be made at my factory of Rampur”;

“10,000 rupees out of my five per cent. promissory notes of the Government of India”;

an annuity of 500 rupees "from my funded property":
 "1,000 rupees out of the sum of 2,000 rupees due to me by C":
 an annuity, and directs it to be paid "out of the rents arising from my taluk of Ramnagar".

(iii) A bequeaths to B—

"10,000 rupees out of my estate at Ramnagar," or charges it on his estate at Ramnagar:

"10,000 rupees, being my share of the capital embarked in a certain business."

Each of these bequests is demonstrative.

(This is sec. 137 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

See the following cases, *Chinnam v. Tadikonda*, 29 Mad. 155; *Sahib Mirza v. Umda Khanam*, 19 Cal. 444, 19 I. A. 83; *In re Walford*, *Kenyon v. Walford*, (1912) 1 Ch. 219.

151. Where a portion of a fund is specifically bequeathed and a legacy is directed to be paid out of the same fund, the portion specifically bequeathed shall first be paid to the legatee, and the demonstrative legacy shall be paid out of the residue of the fund and, so far as the residue shall be deficient, out of the general assets of the testator.

Order of payment when legacy directed to be paid out of fund the subject of specific legacy.

Illustration.

A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. The debt due to A from W is only 1,500 rupees; of these 1,500 rupees, 1,000 rupees belong to B, and 500 rupees are to be paid to C. C is also to receive 500 rupees out of the general assets of the testator.

(This is sec. 138 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

CHAPTER XVI.

Of Ademption of Legacies.

152. If anything which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the legacy is adeemed; that is, it cannot take effect, by reason of the subject-matter having been withdrawn from the operation of the will.

Ademption explained.

Illustrations.

(i) A bequeaths to B—

"the diamond ring presented to me by C":

"my gold chain":

"a certain bale of wool":

"a certain piece of cloth":

"all my household goods which shall be in or about my dwelling house in M Street in Calcutta, at the time of my death."

in his life time,—

sells or gives away the ring ·

converts the chain into a cup ·

converts the wool into cloth :

makes the cloth into a garment :

takes another house into which he removes all his goods.

Each of these legacies is adeemed.

(ii) A bequeaths to B—

"the sum of 1,000 rupees in a certain chest":

"all the horses in my stable."

At the death of A, no money is found in the chest, and no horses in the stable. The legacies are adeemed.

(iii) A bequeaths to B certain bales of goods. A takes the goods with him on a voyage. The ship and goods are lost at sea, and A is drowned. The legacy is adeemed.

(This is sec. 139 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act. In ill. (i) the letter A before the words "in his life time" appears to be wanting by oversight as it occurred in the illustration of the old Act).

COMMENTARY.

Ademption may be defined to be the failure of a specific bequest or devise through its subject not being in existence *in specie* at the time of the testator's death as part of his estate, *Barker v. Rayner* 5 Madd. 208. The general rule is that in order to complete the title of a specific legatee to his legacy the thing bequeathed must at the testator's death remain *in specie* as described in the will, otherwise the legacy is considered as revoked by ademption. It is only a specific bequest that is liable to ademption; a demonstrative legacy is not adeemed by reason that the property on which it is charged by the will does not exist at the time of the death of the testator, or has been converted into property of a different kind; but it shall in such cases be paid out of the general assets of the testator. Ademption arises from a supposed alteration of the intention of the testator.

The conversion must be complete in the lifetime of the testator. A direction to sell, not carried out till after the testator's death, will not effect ademption, *Harrison v. Asher*, 2 De G. & Sm. 436. It is not necessary that the conversion should be the act of the testator. It is sufficient if the property is converted by some duly authorised person with the knowledge or sanction of the testator. There will be no ademption where the specific thing has been converted without authority. Destruction of the property by *vis major*, such as the loss of a ship, effects an ademption of the legacy. (Ill. iii.).

Examples.

(1) A testator bequeathed an article to A. He subsequently took the article on a voyage. The ship was lost, the article perished and the testator was drowned. The article was insured. A claimed the insurance money. *Held*, he was not entitled. The bequest was adeemed as it could not be shown that the testator died before the article perished, *Durrant v. Friend*, 5 De G. & Sm 313.

(2) A testator made the following bequest:—"To A, now at school, my capital stock of £1,000 in the India Company's stock." The testator afterwards sold the stock. *Held*, bequest adeemed, *Ashburner v. Maguire*, 2 Bro. C. C. 108.

(3) A testator gave certain debentures of a company upon certain trusts. After the date of the will the testator exercised the option given to him by the company who had issued the debentures and converted them into debenture stock of the same Company. *Held*, the legacy was adeemed and the debenture stock did not pass, *Re Lane*, 14 C. D. 856.

153. A demonstrative legacy is not adeemed by reason that the property on which it is charged by the will does not exist at the time of the death of the testator, or has been converted into property of a different kind, but it shall in such case be paid out of the general assets of the testator.

Non-adeemption of demonstrative legacy.

(This is sec. 110 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

154. Where the thing specifically bequeathed is the right to receive something of value from a third party, and the testator himself receives it, the bequest is adeemed.

Adeemption of specific bequest of right to receive something from third party.

Illustrations.

(1) A bequeaths to B—

- "the debt which C owes me";
- "2,000 rupees which I have in the hands of D";
- "the money due to me on the bond of E";
- "my mortgage on the Rampur factory."

All these debts are extinguished in A's lifetime, some with and some without his consent. All the legacies are adeemed.

(11) A bequeaths to B his interest in certain policies of life assurance. A in his lifetime receives the amount of the policies. The legacy is adeemed.

(This is sec. 141 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Adeemption of Specific Bequest of a Debt.—Where a debt due from a third person to the testator is bequeathed specifically and the testator recovers the debt in his lifetime, the legacy is adeemed and if he recovers a portion of the debt, the legacy is adeemed *pro tanto*, whether the debt is paid by the debtor voluntarily or not, *Humphreys v. Humphreys*, 2 Cox, 184.

But if the subject of the gift is not a debt *quid* debt but a gift of a sum of money, e. g., a gift of "whatever sum may be received from my claim on A" (see ill. to sec. 162) and the testator recovers the claim and *sets it apart* from the general mass of his property, the legacy is not adeemed. But if he mixes it up the adeemed.

Ademption pro tanto by testator's receipt of part of entire thing specifically bequeathed.

155. The receipt by the testator of a part of an entire thing specifically bequeathed shall operate as an ademption of the legacy to the extent of the sum so received.

Illustration.

A bequeaths to B "the debt due to me by C." The debt amounts to 10,000 rupees C pays to A 5,000 rupees the one-half of the debt The legacy is revoked by ademption, so far as regards the 5,000 rupees received by A.

(This is sec. 142 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

156. If a portion of an entire fund or stock is specifically bequeathed, the receipt by the testator of a portion of the fund or stock shall operate as an ademption only to the extent of the amount so received; and the residue of the fund or stock shall be applicable to the discharge of the specific legacy.

Ademption pro tanto by testator's receipt of portion of entire fund of which portion has been specifically bequeathed.

Illustration

A bequeaths to B one-half of the sum of 10,000 rupees due to him from W. A in his lifetime receives 6,000 rupees, part of the 10,000 rupees The 4,000 rupees which are due from W to A at the time of his death belong to B under the specific bequest.

(This is sec. 143 of the Succession Act X of 1865 It applies to Hindus within the territories mentioned in sec. 57 i. e., to Hindus formerly governed by the Hindu Wills Act).

157. Where a portion of a fund is specifically bequeathed to one legatee, and a legacy charged on the same fund is bequeathed to another legatee, then, if the testator receives a portion of that fund, and the remainder of the fund is insufficient to pay both the specific and the demonstrative legacy, the specific legacy shall be paid first, and the residue (if any) of the fund shall be applied so far as it will extend in payment of the demonstrative legacy, and the rest of the demonstrative legacy shall be paid out of the general assets of the testator.

Order of payment where portion of fund specifically bequeathed to one legatee, and legacy charged on same fund to another, and, testator having received portion of that fund, remainder insufficient to pay both legacies

Illustration

A bequeaths to B 1,000 rupees, part of the debt of 2,000 rupees due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. A afterwards receives 5,000 rupees, part of that debt, and dies leaving only 1,500 rupees due to him from W. Of these 1,500 rupees, 1,000 rupees belong to B, and 500 rupees are to be paid to C. C is also to receive 500 rupees out of the general assets of the testator.

(This is sec. 144 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act. In the illustration the figure 5,000 rupees is obviously a mistake for 500 rupees).

Ademption where stock, specifically bequeathed, does not exist at testator's death.

158. Where stock which has been specifically bequeathed does not exist at the testator's death, the legacy is adeemed.

Illustration.

A bequeaths to B—

“my capital stock of 1,000*l* in East Indian Stock”;

“my promissory notes of the Government of India for 10,000 rupees in their 4 per cent. loan”

A sells the stock and the notes The legacies are adeemed.

(This is sec. 145 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

(See next section).

Ademption *pro tanto* where stock, specifically bequeathed, exists in part only at testator's death

159. Where stock which has been specifically bequeathed exists only in part at the testator's death, the legacy is adeemed so far as regards that part of the stock which has ceased to exist.

Illustration.

A bequeaths to B his 10,000 rupees in the 5½ per cent. loan of the Government of India. A sells one-half of his 10,000 rupees in the loan in question. One-half of the legacy is adeemed.

(This is sec. 146 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Ademption of Specific Bequest of Stock.—When stock specifically bequeathed does not wholly or does only in part exist at the testator's death, the legacy will either be totally or partially adeemed as the case may be. For example, the testator sells the stock specifically bequeathed and converts it into another security, or sells a portion of the stock, the legacy is adeemed wholly or partly. But where the stock which has been specifically bequeathed is *lent* to a third person on condition that it shall be replaced and it is replaced accordingly, the legacy is not adeemed. So also, where the testator sells the stock but afterwards purchases an equal quantity of the same stock which exists at the time of his death, the legacy is not adeemed. According to the English cases it appears that the legacy is irretrievably adeemed by the sale of the stock and will not be revived by a new purchase of similar stock by the testator. But see the *dicta* of Lord Talbot in *Partridge v. Partridge*, (1736) Cas. temp. Talb. 227. English law different.

No ademption will take place if the stock or any other thing specifically bequeathed undergoes a change by operation of law or in execution of the provisions of any legal instrument, *e. g.*, where the stock is converted into one of different description by Act of Parliament or by an Act of the Government of India, or when the stock is merely transferred with the testator's consent from the names of trustees to his own name, or from the names of old trustees to the names of new trustees.

Example

A testator bequeathed to A £2,000 part of £7,000 in the hands of his agent in England. Seven days before his death he wrote to his agent in Jamaica desiring him to write to his agent in England to invest all his moneys in any stock most beneficial. The Jamaica agent wrote accordingly but before the letter arrived in England the agent there of his own accord invested the whole of the testator's moneys in certain stock. A claimed the £2,000. *Held*, he was entitled. The legacy was not adeemed by the unauthorised act of the agent *Basan v. Brandon*, 8 Sim. 171. (Sec. 151).

160. A specific bequest of goods under a description connecting them with a certain place is not adeemed by reason that they have been removed from such place from any temporary cause, or by fraud, or without the knowledge or sanction of the testator.

Non-adeemption of specific bequest of goods described as connected with certain place, by reason of removal.

Illustrations

(i) A bequeaths to B "all my household goods which shall be in or about my dwelling house in Calcutta at the time of my death." The goods are removed from the house to save them from fire. A dies before they are brought back.

(ii) A bequeaths to B "all my household goods which shall be in or about my dwelling house in Calcutta at the time of my death." During A's absence upon a journey, the whole of the goods are removed from the house. A dies without having sanctioned their removal.

Neither of these legacies is adeemed.

(This is sec 147 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

(See next section).

161. The removal of the thing bequeathed from the place in which it is stated in the will to be situated does not constitute an adeemption, where the place is only referred to in order to complete the description of what the testator meant to bequeath.

When removal of thing bequeathed does not constitute adeemption.

Illustrations.

(i) A bequeaths to B "all the bills, bonds and other securities for money belonging to me now lying in my lodgings in Calcutta." At the time of his death, these effects had been removed from his lodgings in Calcutta.

(ii) A bequeaths to B all his furniture then in his house in Calcutta. The testator has a house at Calcutta and another at Chinsurah, in which he lives alternately, being possessed of one set of furniture only which he removes with himself to each house. At the time of his death the furniture is in the house at Chinsurah.

(iii) A bequeaths to B all his goods on board a certain ship then lying in the river Hughli. The goods are removed by A's directions to a warehouse, in which they remain at the time of A's death.

No one of these legacies is revoked by adeemption.

(This is section 148 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Ademption of Specific Bequest of Goods by Removal.—Where goods situate at a particular place are specifically bequeathed, removal of them from that place will sometimes operate as an ademption of the legacy, *e. g.*, where a testator bequeathed all his books at his chamber in the Temple and afterwards removed them into the country, *Green v. Symonds*, 1 Bro. C. C. 129. But there will be no ademption if the goods are removed for their *preservation*, *e. g.*, to save them from fire, or if they are removed by *fraud* or without the *knowledge* or sanction of the testator; or where it is clear that the place is merely referred to, to complete the description of what the testator meant to bequeath and is not essential for the purposes of the bequest. For example, where the testator has two houses and has only one set of furniture which he removes from one house to the other and while residing in one of them he bequeaths all his furniture in that house and at his death the furniture is in the other house, the bequest is not adeemed, (III. ii.).

In case of a specific bequest of an article, the sale of that article by the testator operates as an ademption of the legacy. But if the article is not sold but *pledged* or *incumbered* by the testator, the legacy is not adeemed. But the legatee, if he accepts the bequest, will have to redeem the property himself. (Secs. 165 & 167).

Examples.

(1) A testator bequeathed all his household goods, plate, linen, china, etc., which should be in or about his dwelling house at B at the time of his death to A. The testator afterwards took another house into which he removed his furniture from the house at B. *Held*, legacy adeemed by removal, *Heseltine v. Heseltine*, 3 Madd. 276.

(2) A testator bequeathed to his wife the lease of his house in B Street and the household furniture, plate, pictures, etc., therein. The lease expired and the testator sold a part of the furniture and removed the remainder to another house. *Held*, legacy adeemed. The testator had made the bequest with reference to the lease and consequently the bequest failed by change of circumstances, *Colleton v. Garth*, 6 Sim 19.

(3) A testator bequeathed to his wife, "All my interest in my house at L. Street, furniture, books, plate, etc." He afterwards removed his furniture to another street and purchased more articles. *Held*, legacy to wife not adeemed. Here the mention of the house was merely to complete the description of the legacy and the locality was not essential to the bequest, *Norris v. Norris*, 2 Coll. 719.

162. Where the thing bequeathed is not the right to receive something of value from a third person, but the money or other commodity which may be received from the third person by the testator himself or by his representatives, the receipt of such sum of money or other commodity by the testator shall not constitute an ademption; but if he mixes it up with the general mass of his property, the legacy is adeemed.

Illustration.

A bequeaths to B whatever sum may be received from his claim on C. A receives the whole of his claim on C, and sets it apart from the general mass of his property. The legacy is not adeemed.

(This is sec. 149 of the Succession Act X of 1885. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

163. Where a thing specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change takes place by operation of law, or in the course of execution of the provisions of any legal instrument under which the thing bequeathed was held, the legacy is not adeemed by reason of such change.

Change by operation of law of subject of specific bequest between date of will and testator's death.

Illustrations.

(i) A bequeaths to B "all the money which I have in the 5½ per cent loan of the Government of India" The securities for the 5½ per cent. loan are converted during A's lifetime into 5 per cent. stock.

(ii) A bequeaths to B the sum of 2,000*l.* invested in Consols in the names of trustees for A. The sum of 2,000*l.* is transferred by the trustees into A's own name.

(iii) A bequeaths to B the sum of 10,000 rupees in promissory notes of the Government of India which he has power under his marriage settlement to dispose of by will. Afterwards, in A's lifetime, the fund is converted into Consols by virtue of an authority contained in the settlement.

No one of these legacies has been adeemed

(This is sec 150 of the Succession Act X of 1885. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

There will be no ademption when stock is exchanged by the act of law or where the stock is transferred by the trustee to the name of the beneficiary without the knowledge or authority of the testator (see ill. ii.) or by one trustee to another, *Dingwell v. Askew*, 1 Cox. 427; *Re Johnstone's Settlement*, 14 C. D. 162.

Example

A testator by his will gave his ten £4 fully paid ordinary shares in a company to N. Between the date of the will and of the death of the testator the company went into voluntary liquidation for the purposes of reconstruction and as so reconstructed was incorporated in the same name. Under the scheme of reconstruction the testator became entitled to two £5 fully paid preference shares and two £5 fully paid ordinary shares in the new company for every £4 ordinary share he held in the old company, but in all other respects the new company was substantially the same as the old company. *Held*, there had been no ademption and that N was entitled to the substituted shares in the new company, *In re Leeming, Turner v. Leeming*, (1912) 1 Ch 828

164. Where a thing specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change takes place without the knowledge or sanction of the testator, the legacy is not adeemed.

Change of subject without testator's knowledge.

Illustration.

A bequeaths to B "all my 3 per cent. Consols" The Consols are, without A's knowledge, sold by his agent, and the proceeds converted into East India Stock. This legacy is not adeemed.

(This is sec. 151 of the Succession Act X of 1885. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

Stock specifically bequeathed lent to third party on condition that it be replaced.

165. Where stock which has been specifically bequeathed is lent to a third party on condition that it shall be replaced, and it is replaced accordingly, the legacy is not adeemed.

(This is sec. 152 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

Stock specifically bequeathed sold but replaced, and belonging to testator at his death

166. Where stock specifically bequeathed is sold, and an equal quantity of the same stock is afterwards purchased and belongs to the testator at his death, the legacy is not adeemed.

(This is sec. 153 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

CHAPTER XVII.

Of the Payment of Liabilities in respect of the Subject of a Bequest.

167. (1) Where property specifically bequeathed is subject at the death of the testator to any pledge, lien or incumbrance created by the testator himself or by any person under whom he claims, then, unless a contrary intention appears by the will, the legatee, if he accepts the bequest, shall accept it subject to such pledge or incumbrance, and shall (as between himself and the testator's estate) be liable to make good the amount of such pledge or incumbrance.

Non-liability of executor to exonerate specific legatees

(2) A contrary intention shall not be inferred from any direction which the will may contain for the payment of the testator's debts generally.

Explanation.—A periodical payment in the nature of land-revenue or in the nature of rent is not such an incumbrance as is contemplated by this section.

Illustrations.

(i) A bequeaths to B the diamond ring given him by C. At A's death the ring is held in pawn by D, to whom it has been pledged by A. It is the duty of A's executors, if the state of the testator's assets will allow them, to allow B to redeem the ring.

(ii) A bequeaths to B a zamindari which at A's death is subject to a mortgage for 10,000 rupees; and the whole of the principal sum, together with interest to the amount of 1,000 rupees, is due at A's death. B, if he accepts the bequest, accepts it subject to his charge, and is liable, as between himself and A's estate, to pay the sum of 11,000 rupees thus due.

(This is sec. 154 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

In England prior to the passing of Locke King's Act (17 & 18 Vict. C. 113, English law different. S. 1) a gift of specific property which was pawned or incumbered was a full gift and the executor had to redeem it out of the general estate of the testator. Locke King's Act applies to specific bequests of *realty* and it is to the same effect as sec. 167 of this Act, the only difference being that it applies to specific devise of immoveable property. This statute enacts that "when any person shall after 31st December 1854 die seised of or entitled to any estate or interest in *land or other hereditaments* which shall at the time of his death be charged with the payment of any sum of money by way of mortgage and such person shall not by his will or deed or other document have signified *any contrary intention*, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged out of the personal estate or any other real estate of such person but the land or hereditaments so charged shall be primarily liable to the payment of all mortgage debts with which the same shall be charged." With respect to a specific bequest of moveable property which is pledged or charged by the testator, the old rule still applies, *viz.*, that the executor must redeem it out of the general estate of the testator, and if the executor fails to perform that duty, the specific legatee is entitled to compensation to the amount of his legacy out of the general assets of the testator.

According to sec. 167 there is no distinction whether the subject of the bequest is moveable or immoveable property (see illustrations); the legatee if he accepts the bequest must pay the amount of the pledge or incumbrance, unless there is a contrary intention in the will. As pointed out in the explanation to the section a general direction by the testator that all his debts should be paid is not a sufficient indication of a contrary intention. But a direction that the debts should be paid out of some particular fund would be a sufficient indication of a contrary intention. (See Williams on Executors, 10th Edn., p. 1324 footnote p.).

The specific legatee has a sufficient interest in the subject of the bequest and his mortgagee will not be postponed to the creditor of the deceased, *Ambika Charan v. Srimoti*, 10 C. W. N. 38.

Completion of testator's title to things bequeathed to be at cost of his estate.

168. Where anything is to be done to complete the testator's title to the thing bequeathed, it is to be done at the cost of the testator's estate.

Illustrations.

(i) A, having contracted in general terms for the purchase of a piece of land at a certain price, bequeaths to B, and dies before he has paid the purchase-money. The purchase-money must be made good out of A's assets.

(ii) A, having contracted for the purchase of a piece of land for a certain sum of money, one-half of which is to be paid down and the other half secured by mortgage of the land, bequeaths it to B, and dies before he has paid or secured any part of the purchase-money. One-half of the purchase-money must be paid out of A's assets.

(This is sec. 185 of the Succession Act X of 1885. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Completion of testator's title to a thing bequeathed.—Where anything is to be done to complete the testator's title to the thing bequeathed, it is to be done at the *cost of the testator's estate*. For example, where the testator has contracted to purchase a property which he bequeaths specifically but dies before the conveyance is signed, the executors must pay the purchase-money and obtain a conveyance. Where the testator has contracted to purchase certain shares of a company which he bequeaths specifically, if any payments are necessary at the testator's death to constitute him a complete shareholder, they must be borne by his estate. (III. ii., sec. 170). But if he is a complete shareholder, all *calls* made after his death ought to be borne by the specific legatee. (III. iii., sec. 170).

If the estate of the testator is insufficient to perform the contract and the agreement is on that account rescinded, the devisee will, it would seem, be entitled to the moneys as far as sufficient and it has been decided that on the subsequent coming in of the assets, the devisee of the property contracted to be purchased might compel the executor to lay out the purchase-money in the purchase of another property for his benefit, *Whittaker v. Whittaker*, 4 Bro. C. C. 31. But if a good title cannot be made out the devisee of the land agreed to be purchased will not be entitled to the purchase-money or to have any other estate bought for him, *Green v. Smith*, 1 Atk. 572; *Broome v. Vonck*, 10 Ves. 597.

Illustrations.—A takes a lease of a certain land with a covenant to build on the land within a certain time. A commences to build but dies before the building is completed, leaving the covenant unperformed in part. A bequeaths all his interest in the leasehold land to B. B, if he accepts the bequest, must fulfill the covenant and complete the building. The general rule is that the legatees of leasehold estates must take them *cum onere*. *Hickling v. Boyer*, 3 Mac. & G. 635.

169. Where there is a bequest of any interest in immovable property in respect of which payment in the nature of land-revenue or in the nature of rent has to be made periodically, the estate of the testator shall (as between such estate and the legatee) make good such payments or a proportion of them, as the case may be, up to the day of his death.

Exoneration of legatee's immovable property for which land-revenue or rent payable periodically.

Illustration.

A bequeaths to B a house, in respect of which 365 rupees are payable annually by way of rent. A pays his rent at the usual time, and dies 25 days after. A's estate will make good 25 rupees in respect of the rent.

(This is sec. 158 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 37, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Liability in respect of Rents, Taxes, and other Periodical Payments.—In case of bequests of an immovable property, the rents and taxes in respect of that property up to the time of the testator's death should be paid out of the testator's estate, and the taxes, etc., after the death of the testator should be paid by the legatee.

170. In the absence of any direction in the will, where there is a specific bequest of stock in a joint stock company, if any call or other payment is due from the testator at the time of his death in respect of the stock, such call or payment shall, as between the testator's estate and the legatee, be borne by the estate; but, if any call or other payment becomes due in respect of such stock after the testator's death, the same shall, as between the testator's estate and the legatee, be borne by the legatee, if he accepts the bequest.

Exoneration of specific legatee's stock in joint stock company.

Illustrations.

(i) A bequeaths to B his shares in a certain railway. At A's death there was due from him the sum of 100 rupees in respect of each share, being the amount of a call which had been duly made, and the sum of five rupees in respect of each share, being the amount of interest which had accrued due in respect of the call. These payments must be borne by A's estate.

(ii) A has agreed to take 50 shares in an intended joint stock company, and has contracted to pay up 100 rupees in respect of each share, which sum must be paid before his title to the shares can be completed. A bequeaths these shares to B. The estate of A must make good the payments which were necessary to complete A's title.

(iii) A bequeaths to B his shares in a certain railway. B accepts the legacy. After A's death, a call is made in respect of the shares. B must pay the call.

(iv) A bequeaths to B his shares in a joint stock company. B accepts the bequest. Afterwards the affairs of the company are wound up, and each shareholder is called upon for contribution. The amount of the contribution must be borne by the legatee.

(v) A is the owner of ten shares in a railway company. At a meeting held during his lifetime a call is made of fifty rupees per share, payable by three instalments. A bequeaths his shares to B, and dies between the day fixed for the payment of the first and the day fixed for the payment of the second instalment, and without having paid the first instalment. A's estate must pay the first instalment, and B, if he accepts the legacy, must pay the remaining instalments.

(This is sec. 157 of the Succession Act X of 1866. It applies to Hindus within the territories mentioned in sec. 67, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

In this section although the word "stock" is used it means stocks and shares, (see illustrations where the word "share" is used). This section is in accordance with the decision in *Day v. Day*, 1 Dr. and Sm. 261.

CHAPTER XVIII.

Of Bequests of Things described in General Terms.

171. If there is a bequest of something described in general terms, the executor must purchase for the legatee what may reasonably be considered to answer the description.

Bequest of thing described in general terms.

Illustrations.

(i) A bequeaths to B a pair of carriage-horses or a diamond ring. The executor must provide the legatee with such articles if the state of the assets will allow it.

(ii) A bequeaths to B "my pair of carriage-horses." A had no carriage-horses at the time of his death. The legacy fails.

(This is sec. 158 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

The bequest must be described in general terms such as "a horse", "a carriage" (ill. i.). In ill. (ii.) the description is not general but particular and the bequest fails.

CHAPTER XIX.**Of Bequests of the Interest or Produce of a Fund.**

172. Where the interest or produce of a fund is bequeathed to any person, and the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration, the principal as well as the interest shall belong to the legatee.

Bequest of interest
or produce of fund

Illustrations.

(i) A bequeaths to B the interest of his 5 per cent. promissory notes of the Government of India. There is no other clause in the will affecting those securities. B is entitled to A's 5 per cent. promissory notes of the Government of India.

(ii) A bequeaths the interest of his 5½ per cent. promissory notes of the Government of India to B for his life, and after his death to C. B is entitled to the interest of the notes during his life, and C is entitled to the notes upon B's death.

(iii) A bequeaths to B the rents of his lands at X. B is entitled to the lands.

(This is sec. 159 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Bequest of Income of Property Indefinitely.—A gift of the income of property to a person, without limitation as to time, is a gift of the capital, where no other disposition of capital is made. A devise of the income of land has been held in England to pass the fee, *Mannox v. Greener*, L. R. 14 Eq. 456, (ill. iii.). But a gift of income to B and C and the survivor of them gives them only life interests as there is a contrary intention, *Blann v. Bell*, 2 De. G. M. & G. 775. And also if the rent or interest is given to the legatee for life, the legatee is not entitled to the absolute bequest but takes only a life interest, (ill. ii.). In *Adm.-General v. Money*, 15 Mad 448, a bequest of the "benefit interest and profit" of the fund was held to be a gift of the corpus of the fund. See also, *Hemangini v. Nobin Chand*, 8 Cal. 788. As to contrary intention see *Anandrao v. Adm.-General*, 20 Bom. 450; *Shookmoy v. Monohari*, 7 Cal. 269, 11 Cal. 684. (P. C.).

CHAPTER XX.

Of Bequests of Annuities.

173. Where an annuity is created by will, the legatee is entitled to receive it for his life only, unless a contrary intention appears by the will, notwithstanding that the annuity is directed to be paid out of the property generally, or that a sum of money is bequeathed to be invested in the purchase of it.

Annuity created by will payable for life only unless contrary intention appears by will.

Illustrations

(i) A bequeaths to B 500 rupees a year. B is entitled during his life to receive the annual sum of 500 rupees.

(ii) A bequeaths to B the sum of 500 rupees monthly. B is entitled during his life to receive the sum of 500 rupees every month.

(iii) A bequeaths an annuity of 500 rupees to B for life, and on B's death to C. B is entitled to an annuity of 500 rupees during his life. C, if he survives B, is entitled to an annuity of 500 rupees from B's death until his own death.

(This is sec. 160 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

(See next section).

174. Where the will directs that an annuity shall be provided for any person out of the proceeds of property, or out of property generally, or where money is bequeathed to be invested in the purchase of any annuity for any person, on the testator's death the legacy vests in interest in the legatee, and he is entitled at his option to have an annuity purchased for him or to receive the money appropriated for that purpose by the will.

Period of vesting where will directs that annuity be provided out of proceeds of property, or out of property generally, or where money bequeathed to be invested in purchase of annuity

Illustrations.

(i) A by his will directs that his executors shall, out of his property, purchase an annuity of 1,000 rupees for B. B is entitled at his option to have an annuity of 1,000 rupees for his life purchased for him, or to receive such a sum as will be sufficient for the purchase of such an annuity.

(ii) A bequeaths a fund to B for his life, and directs that after B's death, it shall be laid out in the purchase of an annuity for C. B and C survive the testator. C dies in B's lifetime. On B's death the fund belongs to the representative of C.

(This is sec. 161 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Bequest of Annuities.—An annuity is described as a yearly payment of a certain sum of money granted to another in fee, for life, or for years, charging the person of the grantor only. (Williams on Executors, 10th Edn., p. 622).

Definition of "Annuity."

Primâ facie a bequest of an annuity is for life of the legatee only, *e. g.*, a simple gift of an annuity to A, *Gopalkrishna v. Ramnath*, 5 Bom. L. R. 729. (Ills. i., ii., iii., sec. 173). But where the bequest is a *gift of property* which will produce the amount of the annuity, in other words, when the will dedicates the *corpus* of a fund to the purchase of an annuity, the annuity is perpetual, and the annuitant is entitled, at his option, to have an annuity purchased for him or to receive the money appropriated for that purpose by the will. (See ill. i., sec. 174).

To make an annuity created by will perpetual there must be express words in the will to indicate an intention to that effect. The most common indication is a direction by the testator to *segregate* and *appropriate* a portion of his property, from the interest and profits of which the annuity is to be paid. In such a case the annuity is said to be perpetual. (Williams on Executors, 10th Edn., pp. 943-947). The segregation is a common but not the only mode of indicating an intention to make an annuity perpetual, *Panchu Gopal v. Kalidas*, 24 C. W. N. 592. In *Arumugam v. Ammi Ammal*, 1 M. H. C. R. 400, an annuity of Rs. 10 per month was directed to be paid to the legatee with the following direction that after the legatee's death the executors should continue to pay the same to his descendants from generation to generation. It was held that the legatee only took a life interest.

An annuity given for education and maintenance is an annuity for life and is not limited to minority only, *Wilkins v. Jodrell*, L. R. 13 Ch. D. 564; *In re Booth, Booth, v. Booth*, (1894), 2 Ch. 282; *Soames v. Martin*, 10 Sim. 287. In *Agnew v. Matthews*, 1 M. H. C. R. 17, a testator directed that "a monthly stipend of Rs. 15 be paid to my daughter E for her benefit and Rs. 20 for the benefit of her two children during their minority", and a similar annuity to his other daughter M. The testator further provided that in the event of the demise of any child of the daughters Rs. 10 to cease rateably as being the allowance for each child; that on each child attaining the age of 21 the executors should pay to each of them severally the full amount of interest accruing from the estate and after their demise the said interest was likewise to be given to their heirs in succession. It was held that the daughters E and M took the annuities for life, that E and M were entitled to receive during the lifetime and minority of their respective children the monthly sum of Rs. 10 for each child, that upon each child attaining majority the payment in respect of such child ceased.

A bequest of an annuity to two persons for their lives will go to the survivor for his life, *Day v. Day*, Kay, 703; *Moffatt v. Burnie*, 18 Beav. 211.

175. Where an annuity is bequeathed, but the assets of the testator are not sufficient to pay all the legacies given by the will, the annuity shall abate in the same proportion as the other pecuniary legacies given by the will.

Abatement of annuity.

(This is section 162 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

(See next section.)

176. Where there is a gift of an annuity and a residuary gift, the whole of the annuity is to be satisfied before any part of the residue is paid to the residuary legatee, and, if necessary, the capital of the testator's estate shall be applied for that purpose.

Where gift of annuity and residuary gift, whole annuity to be first satisfied.

(This is sec. 163 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Abatement of Annuities.—Generally speaking, annuities are considered as pecuniary legacies. Hence, if the assets of the testator are not sufficient to pay all the legacies in full an annuity will abate *pro rata* with the other pecuniary legacies. But if there is a gift of an annuity and a residuary gift, the annuity takes precedence and, if necessary, the capital of the testator's estate shall be applied for that purpose. The whole loss falls on the residuary legatee. (Williams on Executors, 10th Edn., pp. 1088-1091).

If annuities are given as specific gifts of interest in the *real estate* of the testator, e. g., "An annuity of Rs. 500, out of the rents of my Zamindari of W" (ill. v., sec. 142), the annuities will not abate with the general legacies. An annuity charged on or to be payable out of the *personal estate* of the testator will not make it specific, e. g., "an annuity of Rs. 500 from my *funded* property" (ill. ii., sec. 150), but it will be considered either as a demonstrative legacy or as a general legacy and in case of deficiency of assets it will abate *pro rata*; and the principle will equally apply whether the annuity is directed to be paid immediately on the death of the testator or at a future period. An annuity charged on the personal estate is a general legacy. (Williams on Executors, 10th Edn., p. 1096). When a testator bequeaths legacies and annuities and then gives the residue of his property after payment of his debts and funeral and testamentary expenses, legacies and annuities, the annuitants are not entitled as a matter of right to have the estate converted and a sum sufficient to answer the annuity invested in authorized securities; but they are entitled to have the annuities sufficiently secured. (Williams on Executors, 10th Edn., p. 1135).

In cases where abatement becomes necessary the annuity ought to be valued and the annuitant will be entitled to the amount of the valuation subject to an abatement in proportion to the abatement of the pecuniary legacies, *Wroughton v. Colquhoun*, 1 De G. & Sm. 357.

(As to when the payment of annuities commences see sections 338-340, *infra*.)

CHAPTER XXI.

Of Legacies to Creditors and Portioners.

- 177.** Where a debtor bequeaths a legacy to his creditor, and it does not appear from the will that the legacy is meant as a satisfaction of the debt, the creditor shall be entitled to the legacy as well as to the amount of the debt.

Creditor *primâ facie* entitled to legacy as well as debt.

(This is sec. 164 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Bequest to Creditors.—Where a debtor bequeaths a legacy to a creditor and *there is nothing on the face of the will* to show that the legacy is meant as a satisfaction of the debt, the creditor is entitled to the legacy as well as *the debt*.

Creditor *primâ facie* entitled to legacy as well as debt.

This is a departure from the English law where the rule is established by Courts of Equity that where a debtor bequeaths to his creditor a legacy *equal* to or *greater* than the amount of his debt, it shall be presumed, in the absence of any intimation of a contrary intention, that the legacy was meant as a satisfaction of the debt. But where the legacy is *less* than the debt it shall not be considered as a satisfaction of the debt. (See Williams on Executors, 10th Edn., pp. 1041-1045). In India the doctrine of satisfaction is exploded by sec. 177, and the creditor is *primâ facie* entitled both to the legacy as well as the debt, *Hassonally v. Popallal*, 37 Bom. 211; *Pestonji v. Framji*, 12 Bom. L. R. 863.

- 178.** Where a parent, who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy as well as the portion.

Child *primâ facie* entitled to legacy as well as portion.

Illustration.

A, by articles entered into in contemplation of his marriage with B covenanted that he would pay to each of the daughters of the intended marriage a portion of 20,000 rupees on her marriage. This covenant having been broken, A bequeaths 20,000 rupees to each of the married daughters of himself and B. The legatees are entitled to the benefit of this bequest in addition to their portions.

(This is sec. 165 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Bequest to Portioners.—A portion is a part of a person's estate which is given or left to a child or person to whom another stands in *loco parentis*. The word is specially applied to payments made to younger children out of funds comprised in their

Definition of "Portion"

parents' marriage settlement and in pursuance of the trust thereof. Sec. 178 is also a departure from the English law where the rule has been established that where a

English law is different. parent is under obligation by articles or settlement to provide portions for his children, and he afterwards makes a provision by will for them, such testamentary provision shall *prima facie* be presumed to be a satisfaction or performance of the obligation whether the bequest is greater than, equal to, or less than the amounts of the portions. It will be considered satisfaction of the obligation either in full or in part according to circumstances, see *Jaggivandas v. Brijdas*, 7 Bom. L. R. 299.

No ademption by subsequent provision for legatee. **179.** No bequest shall be wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee.

Illustrations.

(1) A bequeaths 20,000 rupees to his son B. He afterwards gives to B the sum of 20,000 rupees. The legacy is not thereby adeemed.

(2) A bequeaths 40,000 rupees to B, his orphan niece, whom he had brought up from her infancy. Afterwards, on the occasion of B's marriage, A settles upon her the sum of 30,000 rupees. The legacy is not thereby diminished.

(This is sec. 166 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Where a father bequeaths a legacy to a child and afterwards advances or settles a portion for that child, the legacy is not thereby adeemed. (See illustrations to this section).

Under the English law in such a case the legacy is adeemed. There the rule is that where a father gives a legacy to a child it must be understood as a *portion*, although not so described in the will, and if the father afterwards advances a portion for that child, as upon marriage, it will be a complete ademption of the legacy, whether the advancement is greater than, equal to, or less than, the amount of the legacy. If the advancement is less, it will operate as an ademption *pro tanto*, *Pym v. Lockyer*, 5 M. & Cr. 29.

In construing wills of Hindus the rule of double portion may well be borne in mind as a principle of equity, justice, and good conscience in ascertaining the intention of the testator. In *Jaggivandas v. Brijdas*, 7 Bom. L. R. 299, the testator directed his executors to set apart Rs. 2,000 in favour of his son's daughter Nathi and the next day he made an entry in his account books crediting Rs. 2,000 to the account of Nathi. It was held that the two gifts were different and the legatee was entitled to both. The doctrine of advancement has no place under this Act, *Lakshmiah v. Kothandarama*, 29 C. W. N. 1013 (P. C.) ; 27 Bom. L. R. 1076 (P. C.).

CHAPTER XXII.

Of Election.

180. Where a person, by his will, professes to dispose of something which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and in the latter case, he shall give up any benefits which may have been provided for him by the will.

Circumstances in which election takes place

(This is sec. 167 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

(See sec. 182.)

181. An interest relinquished in the circumstances stated in section 180 shall devolve as if it had not been disposed of by the will in favour of the legatee, subject, nevertheless, to the charge of making good to the disappointed legatee the amount or value of the gift attempted to be given to him by the will.

Devolution of interest relinquished by owner.

(This is sec. 168 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

(See sec. 182.)

182. The provisions of sections 180 and 181 apply whether the testator does or does not believe that which he professes to dispose of by his will to be his own.

Testator's belief as to his ownership immaterial.

Illustrations.

(i) The farm of Sultanpur was the property of C. A bequeathed it to B, giving a legacy of 1,000 rupees to C. C has elected to retain his farm of Sultanpur which is worth 800 rupees. C forfeits his legacy of 1,000 rupees, of which 800 rupees goes to B, and the remaining 200 rupees falls into the residuary bequest, or devolves according to the rules of intestate succession, as the case may be

(ii) A bequeaths an estate to B in case B's elder brother (who is married and has children) shall leave no issue living at his death. A also bequeaths to C a jewel, which belongs to B. B must elect to give up the jewel or to lose the estate.

(iii) A bequeaths to B 1,000 rupees, and to C an estate which will, under a settlement, belong to B if his elder brother (who is married and has children) shall leave no issue living at his death. B must elect to give up the estate or to lose the legacy.

(iv) A, a person of the age of 18, domiciled in British India but owning real property in England, to which C is heir-at-law, bequeaths a legacy to C and, subject thereto, d

and bequeaths to B "all my property whatsoever and wheresoever," and dies under 21. The real property in England does not pass by the will. C may claim his legacy without giving up the real property in England.

(This is sec. 169 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act. It corresponds to sec. 35 of the Transfer of Property Act).

COMMENTARY.

Circumstances in which Election takes place.—A case for election arises where a man by his will professes to dispose of something which belongs to another and which he has no right to dispose of and by the same will he confers on that other some property belonging to himself. In such a case the person to whom the thing belongs has to elect, that is to say, he has either to confirm such disposition or to dissent from it; so that if he confirms the disposition he takes the benefit given to him by the testator and gives up the thing belonging to him which the testator has attempted to dispose of in another's favour. If, however, he wishes to keep the thing belonging to him, he must give up the benefit provided for him by the will. He will not be permitted to keep his own thing and enjoy at the same time the fruits of the devise or bequest made in his favour. For example, the farm of Sultanpur is the property of C and is worth Rs. 800. A by his will bequeaths the farm to B and by the same will gives Rs. 1,000 to C. C must elect either to retain the farm or to take Rs. 1,000. If C elects to retain the farm he forfeits Rs. 1,000, out of which Rs. 800 must be paid to B the disappointed devisee and Rs. 200 will fall into the residue, or will devolve according to the rules of intestate succession as the case may be. But if C elects to take the legacy of Rs. 1,000 he must confirm the devise of the farm to B.

The rule is that if the person whose property is attempted to be disposed of, confirms the disposition, then he takes the benefit conferred on him by the will and he relinquishes his own property in favour of the person mentioned in the will. On the other hand, if he dissents from the disposition, he shall give up the benefit provided for him by the will, and the interest so relinquished shall devolve as if it had not been disposed of by the will *subject to the charge of compensating* the disappointed legatee the amount or value of the gift attempted to be given to him by the will, *Pitman v. Crum Ewing*, (1911) A. C. 217; *Douglas Menzies v. Umphelby*, (1908) A. C. 224.

The principle of the doctrine of election is that "he who accepts a benefit under an instrument must adopt the whole of it giving full effect to its provisions and renouncing every right inconsistent with it." In other words a person cannot accept and reject, or take under and against, the same instrument.

The *foundation* of the doctrine of election is the intention of the testator, an intention which extending to the whole disposition, is frustrated by the failure of any part, that is to say, there is a duality of gifts, or of purported gifts,—one of the gifts being to A of the testator's own property, and the other of them being to B of the property of A; and its *characteristic* is that by an equitable arrangement effect is given to the whole instrument.

The only requisite is that there must be a clear intention to dispose of property belonging to the person whom it is attempted to put to his election; but it is not necessary to prove that the testator did not believe that the property was his own, or that he was

The foundation and the characteristic of the doctrine of election.

Requisites of the doctrine of election.

aware that it was not his own. The gist of the rule of election is that the testator gives to one what belongs not to himself but to another, to whom he gives some estate of his own upon the implied condition that the other shall part with his own estate or not take the bounty. It follows, therefore, that the rule is only applicable as between a gift under a will and a claim *dehors* the will and *adverse* to it and not as between one clause in a will and another clause in the same will. And the property *dehors* the will must be such that the person taking under the will can give it up, otherwise no case of election arises. (Williams on Executors, 10th Edn., p. 1183).

Of course, in order that election may exist, it is necessary that the testator should have a decided interest in the property bequeathed by him. The doctrine has no application where the testator bequeaths no property of his own, *Bristol v. Ward*, 2 Ves. 336; *Whistler v. Webster*, 2 Ves. 367.

The doctrine of election is applicable to interests immediate, remote, contingent, of value, or not of value. (See *ills. ii.*, & *iii.*, sec. 182), and also to every species of property moveable or immovable. There is no distinction for the purposes of election between a specific legatee and a residuary legatee, or between legatees and next-of-kin of the testator, *Cooper v. Cooper*, L. R. 6 Ch. App. 19, 7 H. L. 53.

The doctrine of election is not applicable when the bequest is invalid on account of incapacity to bequeath by reason of infancy, insanity, etc. (*Ill. iv.*, sec. 182).

Election may be either express or implied. If a testator provide in his will for a legacy of Rs. 10,000 or an annuity of Rs. 1,000 at the legatee's election, it is clear that the legatee would be compelled to elect, for he cannot have both. This is an instance of an express election which the sections do not deal with. The principle is too obvious to require legislative sanction. The sections treat of implied or constructive election. In order to raise a case of election under these sections it is essential that the testator gives *what belongs to another* and over which he has no power of disposition and he gives to that other some estate of his own upon implied condition that the other shall part with his own estate or not take the bounty. (*Gour's Law of Transfer*, 3rd Edn., Vol. I., p. 312).

Difference between the English and Indian Law of Election.—(1) According to recent decisions in England it has been settled that a legatee by electing against the will *does not incur a forfeiture* of the benefit conferred on him, but is merely bound to make compensation out of it to the person disappointed by his election. Under this Act the rule is that the refractory legatee *forfeits* the legacy.

(2) There is no time fixed by law for making an election in England as is under sec. 176 of this Act.

Hindu Law and Election.—Secs. 167-177 apply to Hindus governed by the Hindu Wills Act. The doctrine will also in generality of cases be applied to Hindus. See *Amanquldat v. Ranchoddas*, 14 Bom. 438; *Pramada v. Lakhi*, 12 Cal. 60.

Bequest for man's benefit how regarded for purpose of election

183. A bequest for a person's benefit is, for the purpose of election, the same thing as a bequest made to himself.

Illustration.

The farm of Sultanpur Khurd being the property of B, A bequeathed it to C; and bequeathed another farm called Sultanpur Buzarg to his own executors with a direction that it should be sold and the proceeds applied in payment of B's debts. B must elect whether he will abide by the will, or keep his farm of Sultanpur Khurd in opposition to it.

(This is sec 170 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

Person deriving benefit indirectly not put to election.

184. A person taking no benefit directly under a will, but deriving a benefit under it indirectly, is not put to his election.

Illustration.

The lands of Sultanpur are settled upon C for life, and after his death upon D, his only child. A bequeaths the lands of Sultanpur to B, and 1,000 rupees to C. C dies intestate shortly after the testator, and without having made any election. D takes out administration to C, and as administrator elects on behalf of C's estate to take under the will. In that capacity he receives the legacy of 1,000 rupees and accounts to B for the rents of the lands of Sultanpur which accrued after the death of the testator and before the death of C. In his individual character he retains the lands of Sultanpur in opposition to the will.

(This is sec 171 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

A bequest for a man's benefit, *e. g.*, a bequest to trustees upon trust for his benefit is for the purpose of election the same as a bequest to himself. But the case of election arises only when the legatee is *directly* benefited by the will. If he derives a benefit indirectly he is not put to his election. For example, a testator bequeaths property belonging to C to B, and to D he gives a legacy of Rs. 1,000. He does not give anything to C. D afterwards purchases the property from C. D will not be put to his election, *In re Lord Chesham, Cavendish v. Dacre*, 31 C. D. 466, 477.

Person taking in individual capacity under will may in other character elect to take in opposition.

185. A person who in his individual capacity takes a benefit under a will may, in another character, elect to take in opposition to the will.

Illustration.

The estate of Sultanpur is settled upon A for life, and after his death, upon B. A leaves the estate of Sultanpur to D, and 2,000 rupees to B, and 1,000 rupees to C, who is B's only child. B dies intestate, shortly after the testator, without having made an election. C takes out administration to B, and as administrator elects to keep the estate of Sultanpur in opposition to the will, and to relinquish the legacy of 2,000 rupees. C may do this, and yet claim his legacy of 1,000 rupees under the will.

(This is sec. 172, Clause (1) of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

186. Notwithstanding anything contained in sections 180 to 185, where a particular gift is expressed in the will to be in lieu of something belonging to the legatee which is also in terms disposed of by the will, then, if the legatee claims that thing, he must relinquish the particular gift, but he is not bound to relinquish any other benefit given to him by the will.

Exception to provisions of last six sections.

Illustration.

Under A's marriage-settlement his wife is entitled, if she survives him, to the enjoyment of the estate of Sultanpur during her life. A by his will bequeaths to his wife an annuity of 200 rupees during her life, in lieu of her interest in the estate of Sultanpur, which estate he bequeaths to his son. He also gives his wife a legacy of 1,000 rupees. The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity but not the legacy of 1,000 rupees.

[This is sec. 172, Clause (2), of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act].

COMMENTARY.

A person who in his individual capacity takes a benefit under the will may in another character, *e. g.*, as an executor or as an administrator, elect to take in opposition to the will. (See illustration to sec. 185).

But this rule is subject to an exception that where a particular gift is expressed to be in lieu of something belonging to the legatee which is also disposed of by will, the legatee must be put to election, *Pramada v. Lakhi*, 12 Cal. 60.

187. Acceptance of a benefit given by a will constitutes an election by the legatee to take under the will, if he had knowledge of his right to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

When acceptance of benefit given by will constitutes election to take under will

Illustrations.

(i) A is the owner of an estate called Sultanpur Khurd, and has a life interest in another estate called Sultanpur Buzurg to which upon his death his son B will be absolutely entitled. The will of A gives the estate of Sultanpur Khurd to B, and the estate of Sultanpur Buzurg, to C. B, in ignorance of his own right to the estate of Sultanpur Buzurg, allows C to take possession of it, and enters into possession of the estate of Sultanpur Khurd. B has not confirmed the bequest of estate of Sultanpur Buzurg to C.

(ii) B, the eldest son of A, is the possessor of an estate called Sultanpur. A bequeaths Sultanpur to C, and to B the residue of A's property. B having been informed by A's executors that the residue will amount to 5,000 rupees, allows C to take possession of Sultanpur. He afterwards discovers that the residue does not amount to more than 500 rupees. B has not confirmed the bequest of the estate of Sultanpur to C.

(This is sec. 173 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

(See next section).

188. (1) Such knowledge or waiver of inquiry shall, in the absence of evidence to the contrary, be presumed if the legatee has enjoyed for two years the benefits provided for him by the will without doing any act to express dissent.

Circumstances in which knowledge or waiver is presumed or inferred.

(2) Such knowledge or waiver of inquiry may be inferred from any act of the legatee which renders it impossible to place the persons interested in the subject-matter of the bequest in the same condition as if such act had not been done.

Illustration.

A bequeaths to B an estate to which C is entitled, and to C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the bequest of the estate to B.

[Clause (1) of this section is sec. 174 and Clause (2) is sec. 175 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i e., to Hindus formerly governed by the Hindu Wills Act].

COMMENTARY.

Election by Conduct.—Acceptance of the benefit given by the will constitutes election in the following cases:—

- (a) If he has knowledge of his right to elect and of those circumstances which would influence the judgment of a reasonable man, or
- (b) If he waives inquiry into the circumstances.

In order to establish a case of election by conduct, it must be shown that the person bound to elect had full knowledge of his rights and acted with an intention to elect. No person is bound to elect without a clear knowledge of the funds, *Whistler v Webster*, 2 Ves. 370; *Indubala v. Manmatha*, 41 C. L. J. 258. When a party has notice that he is bound to elect to take under or against a will and deals with the property given to him by the will as his own, that is a clear deliberate act of election to take the property so given to him. To constitute a binding election the person must have (i) knowledge of his right to elect, (ii) knowledge of the values of the different properties and his own rights in respect of them, and (iii) an intention to elect. If a party acts in ignorance or through a *bona fide* mistake that will not amount to election. (Ill. i., sec. 187).

Waiver of Inquiry.—A waiver of election has in law the same result as if the election had been made and true facts ascertained.

Enjoyment for Two Years.—If the legatee enjoys the benefit provided for him by the will without expressing any dissent for two years, acceptance will be presumed. This is only a presumption throwing the onus on the legatee of proving that he did not elect, which may be rebutted by the legatee.

Election when parties cannot be restored to *status quo*.—Election may be *inferred* when the legatee by his acts renders it impossible to restore the person interested in the subject matter to the same situation, as if such act had not been done. (See ill. sec. 188).

189. If the legatee does not, within one year after the death of the testator, signify to the testator's representatives his intention to confirm or to dissent from the will, the representatives shall, upon the expiration of that period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the will.

When testator's representatives may call upon legatee to elect

(This is sec. 176 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

No time is fixed for making election according to English law.

Postponement of election in case of disability

190. In case of disability the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

(This is sec. 177 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 57, i. e., to Hindus formerly governed by the Hindu Wills Act).

CHAPTER XXIII.

Of Gifts in Contemplation of Death.

Property transferable by gift made in contemplation of death

191. (1) A man may dispose, by gift made in contemplation of death, of any moveable property which he could dispose of by will.

(2) A gift is said to be made in contemplation of death where a man, who is ill and expects to die shortly of his illness, delivers to another the possession of any moveable property to keep as a gift in case the donor shall die of that illness.

(3) Such a gift may be resumed by the giver; and shall not take effect if he recovers from the illness during which it was made; nor if he survives the person to whom it was made.

Illustrations.

(1) A, being ill, and in expectation of death, delivers to B, to be retained by him in case of A's death,—

a watch;

a bond granted by C to A;

- a bank-note :
- a promissory note of the Government of India endorsed in blank :
- a bill of exchange endorsed in blank :
- certain mortgage-deeds.

A dies of the illness during which he delivered these articles.

B is entitled to—

- the watch :
- the debt secured by C's bond :
- the bank-note .
- the promissory note of the Government of India :
- the bill of exchange :
- the money secured by the mortgage-deeds.

(ii) A, being ill, and in expectation of death, delivers to B the key of a trunk or the key of a warehouse in which goods of bulk belonging to A are deposited, with the intention of giving him the control over the contents of the trunk, or over the deposited goods, and desires him to keep them in case of A's death. A dies of the illness during which he delivered these articles. B is entitled to the trunk and its contents or to A's goods of bulk in the warehouse.

(iii) A, being ill, and in expectation of death, puts aside certain articles in separate parcels and marks upon the parcels respectively the names of B and C. The parcels are not delivered during the life of A. A dies of the illness during which he set aside the parcels. B and C are not entitled to the contents of the parcels.

(This is sec 178 of the Succession Act X of 1865. It applies to Hindus within the territories mentioned in sec. 37, i. e., to Hindus formerly governed by the Hindu Wills Act).

COMMENTARY.

Requisites of a valid *donatio mortis causa*. In order to constitute a valid *donatio mortis causa* under this Act, the following requisites must be complied with :—

(1) The property must be *moveable* and such as the donor could dispose of by will.

(2) The gift must be by a man who is in expectation of death. A gift made in contemplation of suicide is not a valid *donatio mortis causa*, *Agnew v. Belfast Banking Co.*, (1896) 2 Ir. R. 204.

(3) It must be conditioned to take effect only on the death of the donor by his existing disorder. The death of the donor must ensue. It does not take effect if the donor recovers from the illness, nor if he survives the donee.

(4) There must be delivery of the subject of donation. The decessor should at the time of the delivery not only part with the possession but also with the dominion over the subject of the gift, *Reddell v. Dobree*, 10 Sim. 244.

A *donatio mortis causa* may be made orally or in writing with or without registration. But delivery is absolutely essential.

What property may form the subject of a *Donatio Mortis Causa*.—Any *moveable* property which a man may dispose of by will may be disposed of by a gift *mortis causa*. Under this Act there is no provision for a *donatio mortis causa* of *immoveable* property.

Section 191 is wider than the English law as regards moveable things that may form the subject of a valid *donatio mortis causa*. A watch, a bond, a bank note, a promissory note, a mortgage deed, etc., can all be subject of a valid *donatio mortis causa* under the Act. (See illustrations). A policy of insurance may be the subject of a gift of this nature, *Witt v. Amis*, 1 Best & Sm. 109. The delivery of a Post Office Savings Bank deposit book may constitute a good *donatio mortis causa* of the balance standing to the credit of the depositor, *Re Weston*, (1902) 1 Ch. 680; *Re Andrews*, (1902) 2 Ch. 394. A cheque drawn by the donor may be a valid *donatio mortis causa*, but it must be paid before the donor's death, *Hewitt v. Kaye*, L. R. 6 Eq. 198. Uncendorsed negotiable instruments payable to order may be the subject of a *donatio mortis causa*, *Veal v. Veal*, 27 Beav. 303.

Effect of Recovery of the Donor from the illness.—If the donor recovers from the illness during which the *donatio mortis causa* was made, or if the donee does not survive the donor, the gift does not take effect.

How a *Donatio Mortis Causa* Differs from a Legacy.—A *donatio mortis causa* differs from a legacy in these respects:—

(1) Probate in respect of it is unnecessary, for such a gift takes effect from the date of the delivery.

(2) No assent or other act on the part of the executor is necessary to perfect the title of the donee.

How it differs from a gift *inter vivos* and resembles a legacy.—(1) It is ambulatory, incomplete, and revocable during the testator's lifetime.

(2) It is liable to the duties imposed on legacies.

(3) It is liable for payment of the debts of the testator upon deficiency of assets.

(See Williams on Executors, 10th Edn., pp. 590-601).

***Donatio Mortis Causa* according to Mahomedan Law.**—Such gifts are known to Mahomedan law, *Fatima Bibi v. Sheikh Ahmed Baksh*, 35 Cal. 271 (P. C.) Gifts made by a Mahomedan during *Marz-ul-Maut* or death-illness cannot take effect beyond a *third* of the surplus of his estate after payment of funeral expenses and debts, unless the heirs give their consent after the death of the donor to the excess taking effect.

Such a gift if made to an heir is not valid unless the other heirs consent thereto after the donor's death.

Delivery of possession is essential to constitute a valid gift *Marz-ul-Maut*.

If a gift is made by a Mahomedan during *Marz-ul-Maut* of the whole of his property and if the donor subsequently recovers from the illness, the gift will take effect to the extent of the whole. Not so under the Succession Act where, if the donor recovers, the gift does not take effect.

Marz-ul-Maut is a malady which induces an apprehension of death in the person suffering from it and which eventually results in death. As for the requisites of a *Marz-ul-Maut* see R
Definition.

v. *Sherbanoo*, 31 Bom. 264; *Sarabai v. Rabiabai*, 30 Bom. 537; *Fatima v. Ahmad*, 31 Cal. 319; *Ibrahim v. Saiboo*, 35 Cal. 1 (P. C.). (Mulla's Mahomedan Law, Ch. VIII).

Donatio Mortis Causa according to Hindu Law.—*Donatio Mortis Causa* is also recognised in Hindu Law, (*Bhasker v. Sarasvatibai*, 17 Bom. 486). Hindu law makes no distinction between an ordinary gift and a gift in contemplation of death. The requisites are, a giving either orally or in writing with the intention of passing the property accompanied by actual delivery and the acceptance by the donee in the lifetime of the donor, *Visatatchmi v. Subbu*, 6 M. H. C. R. 270.

Examples.

(1) A being confined to his bed gave to B a bond for £1,500 two days before his death saying, "There, take that, and keep it" This is a valid *donatio mortis causa*, *Gardiner v. Parker*, 3 Madd 185

(2) A being in a declining state of health delivered to B a locked cash-box and told B to go at his death to his son for the key. The box was twice delivered to A by his desire and he delivered it again to B and it remained with B. When A died B broke it open and found therein a cheque for £500 endorsed on B's name. This is not a valid *donatio mortis causa*, for there was no proper delivery of the box, *Reddell v. Dobree*, 10 Sim. 244.

(3) A, shortly before his death, gave to his wife two bills of exchange which were payable to himself or order. they did not fall due until after his death, and they had not been endorsed by him. *Held*, there had been a valid *donatio mortis causa* of the bills. *Re Mead* 15 C. D. 651, a cheque payable to the donor or order and given by the donor in his last illness stands on the same footing, *Clement v. Cheesman*, 27 C. D. 631

(4) A being sick and in expectation of death delivered to B certain mortgage deeds. A subsequently died of the illness, *Held*, good *donatio mortis causa*, *Duffield v. Hicks*, 1 Bligh, N. S. 428 (Ill. 4, sec. 191)

(5) A being on his death-bed delivers to his wife a cheque. The cheque is not presented to the bank before A's death. This is not a good *donatio mortis causa* of the cheque to the wife *Hewitt v. Kaye*, L. R. 6 Eq. 193. Mere delivery of the cheque which is not paid in the donor's lifetime does not constitute a *donatio mortis causa*, it is the payment which constitutes the necessary delivery

(6) A gives to B a cheque which is presented without delay and the bankers had sufficient assets of A but refused payment because they doubted the signature and the next day A died, the cheque not having been paid. *Held*, the gift was valid, *Bromley v. Brunton* L. R. 6 Eq. 275.

PART VII.

Protection of Property of deceased.

Introduction.

This Part reproduces The Succession (Property Protection) Act No. XIX of 1841. The object of this Part is to provide a summary procedure for the protection of property in cases of dispute as to succession. It is in the nature of an interlocutory proceeding asking the Court to determine who has the right to possession pending the final determination of the right of the parties in a regular suit *Mahmaddbai v. Bai Harabai*, 26 Bom. L. R. 145. In *Sato Koer v. Gopal*, 34 Cal. 929 it was held that Act XIX of 1841 had no application when the property passed by

survivorship. But if the dispute related to an undivided share in the estate it was held in *Gopi Krishna v. Raj Krishna*, 12 C. L. J. 8 that the Act applied. The jurisdiction is only given to the District Judge (sec. 192) and not to a Subordinate Judge and the procedure is by way of application which application must be made within six months of the death of the person whose estate is in question (sec. 205). In the above quoted case of *Mahmadbhai v. Bai Havabai*, 26 Bom. L. R. 145 the present Chief Justice of the Bombay High Court deprecated the practice of proceeding under Act XIX of 1841. "It is no longer expedient that the Court should entertain proceedings under this Act.....When the parties claim the estate of a deceased person the proper course is to file an administration suit and apply for appointment of receiver".

The condition essential for invoking the provisions of this part is that the applicant must show that he has an interest in the estate of the deceased (sec. 192). A summary order made under this part is not a partition of the property, *Bhugwan-deen v. Myna Bae*, 11 M. I. A 487. The decision of the District Judge shall be final (sec. 209), *Gajadhar v. Megha*, 44 All. 546. But the party aggrieved shall have his ordinary remedy of establishing his title to the property in the ordinary way by instituting a suit (sec. 208).

APPOINTMENT OF CURATOR.

The necessary conditions before a Curator is appointed under this part are : (1) that the applicant must show that he has an interest in the property ; (2) that there is danger of misappropriation or waste of the property ; (3) that the applicant will be materially prejudiced if left to the ordinary remedy of a suit and (4) that the application is *bona fide*, (sec. 193). All these conditions must be fulfilled before a Curator can be appointed.

Powers and duties of Curator.—He shall have power to take possession of the property, to manage the property, to recover debts and rents and to file and defend suits. The order of appointment must expressly state that the Curator is empowered to recover debts and rents (sec. 200). He must give security and render faithful account of his management. He shall be subject to all the orders of the District Judge. All payments made to the Curator shall be valid and will discharge the person paying the same (sec. 197, Cl. 1).

Where, however, a succession certificate or probate, or letters are granted, the Curator shall not have authority to exercise any power belonging to the holder of the certificate or to the executor or administrator (sec. 197 Cl. 1).

192. (1) If any person dies leaving property, moveable or immoveable, any person claiming a right by succession thereto, or to any portion thereof, may make application to the District Judge of the district where any part of the property is found or situate for relief, either after actual possession has been taken by another person, or when forcible means of seizing possession are apprehended.

Person claiming right by succession to property of deceased may apply for relief against wrongful possession

(2) Any agent, relative or near friend, or the Court of Wards in cases within their cognizance, may, in the event of any minor, or any disqualified or absent person being entitled by succession to such property as aforesaid, make the like application for relief.

[This is sec. 1 & 2 of the Succession (Property Protection) Act XIX of 1841].

COMMENTARY.

This Part is general and applies to all the subjects in British India. The preamble to the Act XIX of 1841 is as follows:—

" Whereas much inconvenience has been experienced where persons have died possessed of moveable and immoveable property, and the same has been taken upon pretended claims of right by gift or succession; the difficulty of ascertaining the precise nature of the moveable property in such cases, the opportunities for misappropriating such property and also the profits of real property, the delays of a regular suit when vexatiously protracted, and the inability of heirs when out of possession to prosecute their rights, affording strong temptation for the employment of force or fraud in order to obtain possession and whereas, from the above causes, the circumstance of actual possession, when taken upon a succession, does not afford an indication of rightful title equal to that of a decision by a Judge after hearing all parties in a summary suit, though such summary suit may not be sufficient to prevent a party removed from possession thereby from instituting a regular suit: and whereas such summary suit, though it will take away many of the temptations which exist for assuming wrongful possession upon a succession, will be too tardy a remedy for obviating them all, especially as regards moveable property: and whereas it may be expedient, prior to the determination of the summary suit, to appoint a curator to take charge of property upon a succession, where there is reason to apprehend danger of misappropriation, waste, or neglect, and where such appointment will, in the opinion of the authority making the same, be beneficial under all the circumstances of the case: and whereas it will be very inconvenient to interfere with successions to estates by the appointment of curators, or by summary suits, unless satisfactory grounds for such proceedings shall appear, and unless such proceedings shall be required by or on the behalf of parties giving satisfactory proof that they are likely to be materially prejudiced if left to the ordinary remedy of a regular suit."

This part has no application when property passes by survivorship, *Sato Koer v. Gopal*, 34 Cal. 929; but it would apply if the claim is to an undivided share in the estate, *Gopi Krishna v. Raj Krishna*, 12 C. L. J. 8.

193. The District Judge to whom such application is made shall, in the first place, examine the applicant on oath, and may make such further inquiry, if any, as he thinks necessary as to whether there is sufficient ground for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the applicant, or the person on whose behalf he applies, is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a suit, and that the application is made *bona fide*.

[This is sec. 3 of the Succession (Property Protection) Act XIX of 1841].

COMMENTARY.

This section contemplates an inquiry into two points:—*Firstly* whether the opposite party has lawful title and *secondly* whether the applicant is really entitled, whether his application is *bona fide* and whether he is likely to be materially prejudiced if left to a regular suit, *Phul Chand v. Kishmish*, 11 C. L. J. 521; *Kothandarama v. Jagathambal*, (1923) M. W. N. 74; *Bhimappa v. Khanappa*, 34 Bom. 115.

194. If the District Judge is satisfied that there is sufficient ground for believing as aforesaid but not otherwise, he shall summon the party complained of, and give notice of vacant or disturbed possession by publication, and, after the expiration of a reasonable time, shall determine summarily the right to possession (subject to a suit as hereinafter provided) and shall deliver possession accordingly :

Procedure

Provided that the Judge shall have the power to appoint an officer who shall take an inventory of effects, and seal or otherwise secure the same, upon being applied to for the purpose, without delay, whether he shall have concluded the inquiry necessary for summoning the party complained of or not.

[This is sec. 4 of the Succession (Property Protection) Act XIX of 1841].

COMMENTARY.

See *Papamma v. The Collector*, 12 Mad. 341.

195. If it further appears upon such inquiry as aforesaid that danger is to be apprehended of the misappropriation or waste of the property before the summary proceeding can be determined, and that the delay in obtaining security from the party in possession or the insufficiency thereof is likely to expose the party out of possession to considerable risk, provided he is the lawful owner, the District Judge may appoint one or more curators whose authority shall continue according to the terms of his or their respective appointments, and in no case beyond the determination of the summary proceeding and the confirmation or delivery of possession in consequence thereof :

Appointment of curator pending determination of proceeding.

Provided that, in the case of land, the Judge may delegate to the Collector, or to any officer subordinate to the Collector, the powers of a curator :

Provided, further, that every appointment of a curator in respect of any property shall be duly published.

[This is sec. 5 of the Succession (Property Protection) Act XIX of 1841].

196. The District Judge may authorise the curator to take possession of the property either generally, or until security is given by the party in possession, or until inventories of the property have been made, or for any other purpose necessary for securing the property from misappropriation or waste by the party in possession:

Powers conferable on curator.

Provided that it shall be in the discretion of the Judge to allow the party in possession to continue in such possession on giving security or not, and any continuance in possession shall be subject to such orders as the Judge may issue touching inventories, or the securing of deeds or other effects.

[*This is sec 6 of the Succession (Property Protection) Act XIX of 1811.*]

197. (1) Where a certificate has been granted under part X or under the Succession Certificate Act, 1889, or a grant of probate or letters of administration has been made, a curator appointed under this Part shall not exercise any authority lawfully belonging to the holder of the certificate or to the executor or administrator.

Prohibition of exercise of certain powers by curators. Payment of debts, etc., to curator.

(2) All persons who have paid debts or rents to a curator authorised by a Court to receive them shall be indemnified, and the curator shall be responsible for the payment thereof to the person who has obtained the certificate, probate or letters of administration, as the case may be.

[*This is sec. 23 of the Succession Certificate Act VII of 1889.*]

198. (1) The District Judge shall take from the curator security for the faithful discharge of his trust, and for rendering satisfactory accounts of the same as hereinafter provided, and may authorise him to receive out of the property such remuneration, in no case exceeding five per centum on the moveable property and on the annual profits of the immoveable property, as the District Judge thinks reasonable.

Curator to give security and may receive remuneration.

(2) All surplus money realized by the curator shall be paid into Court, and invested in public securities for the benefit of the persons entitled thereto upon adjudication of the summary proceeding.

(3) Security shall be required from the curator with all reasonable despatch, and, where it is practicable, shall be taken generally to answer all cases for which the person may be afterwards appointed curator ; but no delay in the taking of security shall

prevent the Judge from immediately investing the curator with the powers of his office.

[*This is sec 7 of the Succession (Property Protection) Act XIX of 1841.*]

199. (1) Where the estate of the deceased person consists wholly or in part of land paying revenue to Government, in all matters regarding the propriety of summoning the party in possession, of appointing a curator, or of nominating individuals to that appointment, the District Judge shall demand a report from the Collector, and the Collector shall thereupon furnish the same:

Report from Collector where estate includes revenue-paying land.

Provided that in cases of urgency the Judge may proceed, in the first instance, without such report.

(2) The Judge shall not be obliged to act in conformity with any such report, but, in case of his acting otherwise than according to such report, he shall immediately forward a statement of his reasons to the High Court, and the High Court, if it is dissatisfied with such reasons, shall direct the Judge to proceed conformably to the report of the Collector.

[*This is sec 8 of the Succession (Property Protection) Act XIX of 1841*]

200. The curator shall be subject to all orders of the District Judge regarding the institution or the defence of suits, and all suits may be instituted or defended in the name of the curator on behalf of the estate:

Institution and defence of suits.

Provided that an express authority shall be requisite in the order of the curator's appointment for the collection of debts or rents ; but such express authority shall enable the curator to give a full acquittance for any sums of money received by virtue thereof.

[*This is sec. 9 of the Succession (Property Protection) Act XIX of 1841.*]

201. Pending the custody of the property by the curator, the District Judge may make such allowances to parties having a *prima facie* right thereto as upon a summary investigation of the rights and circumstances of the parties interested he considers necessary, and may, at his discretion, take security for the repayment thereof with interest, in the event of the party being found, upon the adjudication of the summary proceeding, not to be entitled thereto.

Allowances to apparent owners pending custody by curator.

[*This is sec. 10 of the Succession (Property Protection) Act XIX of 1841*]

202. The curator shall file monthly accounts in abstract, and shall, on the expiry of each period of three months, if his administration lasts so long, and upon giving up the possession of the property, file a detailed account of his administration to the satisfaction of the District Judge.

Accounts to be filed by curator.

[*This is sec. 11 of the Succession (Property Protection) Act XIX of 1841*].

203. (1) The accounts of the curator shall be open to the inspection of all parties interested ; and it shall be competent for any such interested party to appoint a separate person to keep a duplicate account of all receipts and payments by the curator.

Inspection of accounts and right of interested party to keep duplicate

(2) If it is found that the accounts of the curator are in arrear, or that they are erroneous or incomplete, or if the curator does not produce them whenever he is ordered to do so by the District Judge, he shall be punishable with fine not exceeding one thousand rupees for every such default.

[*This is sec. 12 of the Succession (Property Protection) Act XIX of 1841*].

204. If the Judge of any district has appointed a curator, in respect of the whole of the property of a deceased person, such appointment shall preclude the Judge of any other district within the same province from appointing any other curator, but the appointment of a curator in respect of a portion of the property of the deceased shall not preclude the appointment within the same province of another curator in respect of the residue or any portion thereof:

Bar to appointment of second curator for same property.

Provided that no Judge shall appoint a curator or entertain a summary proceeding in respect of property which is the subject of a summary proceeding previously instituted under this Part before another Judge:

Provided, further, that if two or more curators are appointed by different Judges for several parts of an estate, the High Court may make such order as it thinks fit for the appointment of one curator of the whole property.

[*This is sec. 13 of the Succession (Property Protection) Act XIX of 1841*].

205. An application under this Part to the District Judge must be made within six months of the death of the proprietor whose property is claimed by right in succession.

Limitation of time for application for curator.

[*This is sec. 14 of the Succession (Property Protection) Act XIX of 1841*].

COMMENTARY.

The expression "by right in succession" is chosen to describe the point of view of the Judge and not the point of view of the interested parties. All that the Judge has to decide is, who should be put in possession of the property in succession to the last deceased holder, *Bhimappa v. Khanappa*, 11 Bom. L. R. 1308, 34 Bom. 115.

206. Nothing in this Part shall be deemed to authorise the contravention of any public act of settlement or of any legal directions given by a deceased proprietor of any property for the possession of his property after his decease in the event of minority or otherwise, and, in every such case, as soon as the Judge having jurisdiction over the property of a deceased person is satisfied of the existence of such directions, he shall give effect thereto.

Bar to enforcement of Part against public settlement or legal directions by deceased.

[This is sec. 15 of the Succession (Property Protection) Act XIX of 1841].

207. Nothing in this Part shall be deemed to authorise any disturbance of the possession of a Court of Wards of any property ; and in case a minor, or other disqualified person whose property is subject to the Court of Wards is the party on whose behalf application is made under this Part, the District Judge, if he determines to summon the party in possession and to appoint a curator, shall invest the Court of Wards with the curatorship of the estate pending the proceeding without taking security as aforesaid ; and if the minor or other disqualified person, upon the adjudication of the summary proceeding appears to be entitled to the property, possession shall be delivered to the Court of Wards.

Court of Wards to be made curator in case of minors having property subject to its jurisdiction.

[This is sec. 16 of the Succession (Property Protection) Act XIX of 1841].

208. Nothing contained in this Part shall be any impediment to the bringing of a suit either by the party whose application may have been rejected before or after the summoning of the party in possession, or by the party who may have been evicted from the possession under this Part.

Saving of right to bring suit.

[This is sec. 17 of the Succession (Property Protection) Act XIX of 1841].

209. The decision of a District Judge in a summary proceeding under this Part shall have no other effect than that of settling the actual possession ; but for this purpose it shall be final, and shall not be subject to any appeal or review.

Effect of decision of summary proceeding.

[This is sec. 18 of the Succession (Property Protection) Act XIX of 1841].

COMMENTARY.

But though the decision of the District Judge is final, it may form the subject of a revision in a proper case where the Judge has acted illegally or with material irregularity, see *Abdul Rahiman v. Kutti Ahmed*, 10 Mad. 68; *Sato Koer v. Gopal*, 34 Cal. 929; *Krishnasami v. Muthukrishna*, 24 Mad. 364. In *Bhimappa v. Khanappa*, 34 Bom. 115 the Court declined to interfere.

No appeal will lie, *Gojadhari v. Megha*, 44 All. 546.

210. The Local Government may appoint public curators for any district or number of districts; and the District Judge having jurisdiction shall nominate such public curators in all cases where the choice of a curator is left discretionary with him under this Part.

Appointment of public curators.

[This is sec. 19 of the Succession (Property Protection) Act XIX of 1811]

PART VIII.

Representative title to property of deceased on succession.

211. (1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

Character and property of executor or administrator as such.

(2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

[Clause (1) is sec. 170 of the Succession Act X of 1865 Clause (2) is sec. 4 of the Probate and Administration Act V of 1881].

COMMENTARY.

For the definition of "executor" and "administrator" see sec. 2. The words "legal representative," "legal personal representatives" or "representatives" mean executor or administrator as the case may be.

Difference between Executor and Administrator.—(1) An executor derives his title from the will and all the property of the deceased vest in him from the moment of the testator's death. An administrator derives his title from the grant of letters of administration, *Soona Mayna v. Soona Navena*, 20 C. W. N. 833 (P. C.). Until the grant of letters of administration he has no title or authority to the estate of the deceased. An act, therefore, done to the prejudice of the estate by a person who afterwards becomes administrator is not made good by subsequent

grant of administration. It is only where the act is for the benefit of the estate, that the relation back exists and the act is rendered valid by the grant. There is no such restriction in case of an executor who is a person of the testator's own choice.

(2) Consequently an executor can do many acts before the grant of probate which an administrator cannot do.

(3) An executor is not required to execute a bond for due administration⁴ under this Act; but an administrator is bound to execute the bond.

(4) He can institute a suit in the character of an executor before he proves the will; an administrator cannot, *Soona Mayna v. Soona Navena*, 20 C. W. N. 833 (P. C.).

(5) In the case of a cause of action arising in favour of the estate of the deceased at or after his death time will at once run if there be an executor even though probate has not been obtained; but if there is no executor time will run from the actual grant of letters of administration, *Soona Mayna v. Soona Navena*, 20 C. W. N. 833 (P. C.); *Miyappa v. Supramania*, 18 Bom. L. R. 642 at 649.

Character and Property of Executor and Administrator.—Section 211 puts an executor in India on the same footing as an executor in England, *In re Ezekiel*, 21 Bom. 139 at 149. The personal property of the testator including all rights of action vest in him, *Soona Mayna v. Soona Navena*, 20 C. W. N. 833 (P. C.). The estate of the deceased vest in all the executors and not only in those who have proved the will or acted in the administration, *In re Pawley and London and Provincial Bank*, (1900) 1 Ch. 58; *Chidambara v. Krishnasami*, 39 Mad. 365 at 373. (An administrator appointed under sec. 10 of Reg. VIII of 1827 has, however, been held not to be the legal representative of the deceased. See *Malapa v. Devi*, 21 Bom. 102; *contra*, *Mir Ibrahim v. Ziaulnissa*, 12 Bom. 150.

All the property of the deceased whether moveable or immoveable vest in the executor or administrator. It includes property either in the actual possession of the testator or in which he had a vested interest or over which he had a general power of appointment. If the executor died without accepting the office then the estate is not vested in him but in the legal representatives of the testator, *Rajah Parthasarathy v. Rajah Venkatadri*, 46 Mad. 190. This section gives the executor a right of administration to all the property of the testator which vests in him wherever situate in British India or in other countries, *In re Ezekiel*, 21 Bom. 139. The following properties do not vest in the executor or administrator.

(a) Property which pass by survivorship (sec. 4 of the Probate & Administration Act), *Bodi v. Venkatasami*, 38 Mad. 369, and joint family property.

(b) Partnership property.

(c) Sums deposited in joint names.

(d) Property held in trust or over which the testator has no disposing power, *De Souza v. Secretary of State*, 12 B. L. R. 423, 4 Cal. 1.

The Interest of an Executor or Administrator in the Property of the Deceased.—An executor or administrator is not the absolute owner of the property of the deceased in the sense of being the beneficial owner thereof. He holds the property in *autre droit*, viz., as the minister or dispenser of the property of the

deceased, *Pinchon's Case*, 8 Co. 88, b. "An executor has the property only under a trust to apply it for payment of the testator's debts and such other purposes as he ought to fulfil in the course of his office as executor", *Farr v. Newman*, 4 T. R. 621, at 645. If, therefore, an executor or administrator becomes insolvent, and if the property of which he is the executor or administrator is not mixed up with his own property, it will not be liable to distribution among his creditors, nor can the goods of a testator in the hands of his executor be seized in execution of a judgment against the executor in his own right. (Williams on Executors, 10th Edn., pp. 474-484).

Character and Property of the Executor of the Will of a Hindu.—

Position of the executor of the will of a Hindu.

Prior to the passing of the Probate and Administration Act, the position of the executor of the will of a Hindu, not governed by the Hindu Wills Act, was very inferior. His position was that of a manager, *Grish Chunder v. Broughton*, 14 Cal. 861; *Sadhir v. Gobinda*, 45 Cal. 538. Probate conferred on him no right of property analogous to that of an English executor. His dealings with the property of the testator were governed by the provisions of the will, *Jugmohandas v. Pallonjee*, 22 Bom. 1. Beyond that he had the bare power of a manager. The mere appointment did not have the effect of vesting in the executor the property of the testator, *Amulya v. Kali Das*, 32 Cal. 861; *Sarat Chandra v. Bhupendra*, 25 Cal. 103. The word "vest" is not an appropriate one to describe the position of a Hindu executor in a will made prior to the Hindu Wills Act, *Khirode money v. Doorgamoney*, 4 Cal. 455 at p. 458; *Maniklal v. Manchershhi*, 1 Bom. 269; *Lallubhai v. Mankuverbai*, 2 Bom. 388. See also *Adm.-General v. Premlal*, 22 Cal. 788, 22 L. A. 135. When the Hindu Wills Act incorporated sec. 179 of the Succession Act X of 1865 the executor acquired a statutory position and he was placed on the same footing as that of an English executor, *Bai Meherbai v. Maganchand*, 29 Bom. 96; see also *Lalchand v. Gombibai*, 8 B. H. C. R. 140 (o. c. j.) where the legal status of the administrator of a Hindu is compared with that of English administration.

Under the Probate and Administration Act, however, the executor or administrator of a deceased Hindu is his legal representative and all the property of the deceased vests in him as such, except such property of the deceased as passes by survivorship, that is to say, coparcenary and joint family property, *Bai Harkor v. Maniklal*, 12 Bom. 621; *Collector v. Savchand*, 27 Bom. 140. Hence the position of the executor or administrator under the Probate and Administration Act is analogous to that of an executor or administrator under the Succession Act except only as to the joint family property. But there is this difference between an executor under the Probate Act and an executor under the Hindu Wills Act, viz., that an executor under the Probate Act is not required to obtain a grant and he can clothe his vendee with full title even without obtaining any probate or letters of administration, *Ganapathi v. Sivamalai*, 36 Mad. 575. Further that sec. 179 of the Succession Act X of 1865 as incorporated in the Hindu Wills Act did not apply when the property was situate outside Bombay, *Bai Harkor v. Maniklal*, 12 Bom. 621.

Character and Property of the Executor of the Will of a Mahomedan.—

Position of the executor or administrator of a Mahomedan

Under the provisions of the Probate and Administration Act the executor or administrator of a deceased Mahomedan is his legal representative for all purposes of administration and all the property of the deceased vests in him. But a Mahomedan

cannot dispose of by will more than one-third of his property after the payment of his debts and funeral expenses, the remaining two-thirds must go to his heirs unless the heirs consent to the excess taking effect. In *Fatma v. Shaik Essa*, 7 Bom. 266, it was held that an executor of a will of a Mahomedan cannot claim to represent the estate of his testator until he has taken out probate, (see also *Shaik Moosa v. Shaik Essa*, 8 Bom. 241). But in the latest case of *Sir Mahomed Yusuf v. Hargovandas*, 47 Bom. 231, it was held that the executor of the will of a Mahomedan can validly sell and convey the testator's immoveable property without taking out probate or obtaining the consent of all the heirs of the testator. The character and position of the executor of a Mahomedan, however, is clearly pointed out by their Lordships of the Privy Council in the case of *Mirza Kurrutulain v. Peara Saheb*, 33 Cal. 116 (P. C.), 32, I. A. 244. Under the system of Mahomedan law a Mahomedan executor took no title to the property merely as such by virtue of the probate. Such a title was created for the first time by the Probate and Administration Act. Since by Mahomedan law a testator has power to dispose of one-third of the property, an executor of a Mahomedan will who had obtained probate is a bare trustee for the heirs as to two-thirds of the estate when realized and an active trustee as to one-third for the purpose of the will and of these trusts one is created by the Act and the probate, irrespective of the will and the other by the will. The effect of the probate is limited to the effect given to it by the terms of the Act itself.

212. (1) No right to any part of the property of a person who has died intestate can be established in any Court of Justice, unless letters of administration have first been granted by a Court of competent jurisdiction.

Right to intestate's property.

(2) This section shall not apply in the case of the intestacy of a Hindu, Muhammadan, Buddhist, Sikh, Jaina or Indian Christian.

[Clause (1) is sec. 190 of the Succession Act X of 1865; Clause (2) is sec. 391 of the Succession Act X of 1865; and sec. 3 of the Native Christian Administration Act VII of 1901].

COMMENTARY.

If a person governed by this Act dies *intestate* it is essential that letters of administration must be obtained before establishing any right to his property. As regards Hindus, Muhammadans, Buddhists, Sikhs, Jains and Indian Christians they are exempted, and it is not necessary in case of intestacy to obtain letters. For further commentary see next section.

213. (1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in British India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.

Right as executor or legatee when established.

(2) This section shall not apply in the case of wills made by Muhammadans, and shall only apply in the case of wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of the class specified in section 57.

[Clause (1) is sec. 187 of the Succession Act X of 1865; Clause (2) is sec. 331 of the Succession Act X of 1865 and sec. 2 of the Hindu Wills Act XXI of 1870]

COMMENTARY.

Grant of Probate and Letters of Administration with Will Annexed when essential.—The grant of probate or letters of administration with the will annexed is essential in case of Europeans, Parsis and Hindus formerly governed by the Hindu Wills Act. Clause (1) of this section enacts that no right as executor or legatee can be established in any Court of Justice unless a Court of competent jurisdiction in British India shall have granted probate of the will under which the right is claimed or shall have granted letters of administration with the will annexed or with a copy of an authenticated copy of the will annexed, *Alamelammall v. Surya-prakasaroja*, 38 Mad. 988. This section not only affects the establishment of the right to a legacy by a legatee himself or some other person claiming under him but also declares a person who desires to establish the legatee's right merely as a *jus tertii* for the purpose of his defence, *Lakshamma v. Ratnamma*, 38 Mad. 474. If, however, a will is once proved and the probate or letters are granted that would entitle any one of the legatees to obtain relief. If a legatee sues the executor for the legacy bequeathed to him, the executor may apply that other legatees may be joined as parties to the suit for rateable distribution and abatement, *Purshottam v. Kala*, 26 Bom. 301; *In the goods of Premchand*, 21 Cal. 832. If a legatee to whom the letters of administration with the will annexed are granted dies it is not necessary that other legatees should prove the will, *Chandra v. Prasanna*, 10 C. W. N. 864; 15 C. W. N. 121 (P. C.); 38 Cal. 327. But although under this section probate is necessary the section does not debar a defendant from relying on a will in respect of which no probate or letters of administration have been granted for purposes other than the establishment of the right of an executor or of a legatee, *Janaki v. Dhanu Lall*, 14 Mad. 454; *Caralapathi v. Cota*, 33 Mad. 91; *Achyutananda v. Jagannath*, 20 C. W. N. 122.

In cases of wills of persons formerly governed by the Probate & Administration Act it is to be remembered that probate is not necessary for such wills. Therefore, if a person wants to establish his right as an executor or as a legatee without obtaining probate or letters of administration, it is for the Court to determine whether the will is genuine and valid and whether it confers upon the plaintiff or applicant the right which he claims, *Bhagvansang v. Becharadas*, 6 Bom. 73; see also *Janaki v. Dhanu Lall*, 14 Mad. 454; *Prosunno v. Kristo*, 4 Cal. 342; *Balakrishnudu v. Narayanaswamy*, 37 Mad. 175; *Chidambara v. Krishnasami*, 39 Mad. 365

Hindu Wills Act.—Section 187 of the Succession Act X of 1865 was incorporated in the Hindu Wills Act. It follows, therefore, that as regards wills of Hindus governed by the Hindu Wills Act, probate thereof or letters of administration with the will annexed *must* be obtained. Hence a legatee under a will governed by this Act cannot file a suit against the executor who has not obtained probate to recover his legacy or for administration, *Lakshamma v. Ratnamma*, 38 Mad. 474; *Alamelammall v. Surya*, 38 Mad. 988; *Gordhandas v. Ramcoover*, 26 Bom. 267.

The Hindu Wills Act applied—

(a) To all wills and codicils made by any Hindu, Jaina, Sikh, or Buddhist on or after 1st September 1870 within the Presidency of Bengal, and in the towns of Bombay and Madras, and

(b) To all wills and codicils made outside those territories so far as relates to immoveable property situate within those territories. (Sec. 2, Hindu Wills Act).

Probate and Administration Act.—Sections 187 and 190 of the Succession Act X of 1865 were not incorporated in the Probate and Administration Act and the same is the case under this Act.

It follows, therefore, that in case of Hindus not coming under sec. 57 and Mahomedans, no probate of the will or letters of administration in case of intestacy are required, *Chidambara v. Krishnasami*, 39 Mad. 365. Although it is not necessary for a Hindu governed by the Mitakshara law to obtain letters of administration in respect of the joint family property if it stand in the name of one member of the family, still in cases of shares of joint stock companies, if the shares stand in the name of one member, it is necessary on his death to obtain letters of administration before the company can be compelled to transfer the shares, see *Bank of Bombay v. Ambalal*, 24 Bom 350; probate duty, however, will not be payable if the shares are proved to be the property of the joint family, *Keshavlal v. Collector of Ahmedabad*, 25 Bom. L. R. 1240 Hence, the result is :—

(1) Probate of wills, or letters of administration in case of intestacy, are necessary in the case of persons governed by the Succession Act, *i. e.*, Europeans, East Indians, Armenians, Jews, and Parsis.

(2) Probate is necessary in the case of the will of an Indian Christian. But if an Indian Christian dies intestate, no letters of administration are necessary. See sec. 212, Cl. (2) which reproduces sec. 3 of the Native Christian Administration of Estates Act, No. VII of 1901 whereby Native Christians had been exempted from the operation of sections 190 and 239 of the Succession Act X of 1865.

(3) Probate is necessary in case of wills of Hindus, Jains, Sikhs, and Buddhists to whom sec. 57 applies, that is to say, (a) in case of wills and codicils made by any Hindu, Jaina, Sikh, and Buddhist on or after 1st September 1870 within the territory subject to the Governor of Bengal, and in the towns of Madras, and Bombay, or (b) in case of wills and codicils made outside those territories and limits, *so far as relates to immoveable property situated* within those territories and limits, *Narayan v. Pandurang*, 34 Bom. 506.

NOTE.—If the estate is worth less than Rs. 1,000, the certificate of the Administrator-General under section 31 of the Administrator-Generals Act would be sufficient, *Narayan v. Pandurang*, 34 Bom. 506.

(4) No probate is necessary in case of wills of Hindus, Jains, Sikhs, and Buddhists made prior to 1st September 1870, *Krishna v. Panchuram*, 17 Cal. 272.

(5) No probate is necessary of the wills of Hindus, Jains, Sikhs, and Buddhists to whom sec. 57 does not apply, *i. e.*, to Hindus formerly governed by the Probate and Administration Act, *i. e.*, of wills made by them outside the Presidency of Bengal and the towns of Madras and Bombay, and not relating to any immoveable property situate within those limits, *Bhagvansingh v. Bechardas*, 6 B.

73. No letters of administration are necessary in case of Hindus, Jains, Sikhs, and Buddhists governed by sec. 212 in the event of intestacy. It is only when proceedings have to be taken in Court and when it is necessary in such proceedings for the plaintiff to prove his title under the will to the relief he claims that the Court will insist upon probate or letters of administration being granted before the plaintiff can take advantage of the decree, *Shankar v. Dattatraya*, 45 Bom. 1186.

(6) No probate of the will and no letters of administration in case of intestacy of a Mahomedan are necessary, *Shaik Moosa v. Shaik Essa*, 8 Bom. 241; *Sakina v. Mahomed*, 37 Cal. 839; *Ganapathi v. Sivamalai*, 36 Mad. 575; *Sir Mahomed Yusuf v. Hargowandas*, 47 Bom. 231. The will may be tendered in evidence and proved in any proceeding without probate, *Sakina Bibee v. Mahomed*, 15 C. W. N. 185; see also *Haji Mahomed Mitha v. Musaji Esaji*, 15 Bom. 657.

(7) No probate is necessary in case of Khojas, *Abdul Karim v. Karmali Rahimtula*, 22 Bom. L. R. 708.

Proof of representative title a condition precedent to recovery through the Courts of debts from debtors of deceased persons.

214. (1) No Court shall—

- (a) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof, or
- (b) proceed, upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt,

except on the production, by the person so claiming, of—

- (i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or
- (ii) a certificate granted under section 31 or section 32 of the Administrator General's Act, 1913, and having the debt mentioned therein, or
- (iii) a succession certificate granted under Part X and having the debt specified therein, or
- (iv) a certificate granted under the Succession Certificate Act, 1889, or
- (v) a certificate granted under Bombay Regulation No. VIII of 1827 and, if granted after the first day of May, 1889, having the debt specified therein.

(2) The word "debt" in sub-section (1) includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.

(This is sec 1 of the Succession Certificate Act VII of 1889)

COMMENTARY.

Filing Suits.—An executor derives his title from the will and not from the grant of probate. In order, therefore, to protect the estate or to recover things due to the estate an executor may at once institute an action before the grant; but he cannot obtain a decree before the grant of probate, *Soona Moyna, v. Soona Navena*, 20 C. W. N. 833 (P. C.); *Chandra v. Prasanna*, 15 C. W. N. 121 (P. C.); 38 Cal. 327 (P. C.); *Basanta Kumar v. Gopal Chunder*, 18 C. W. N. 1136; *Jamsetji v. Hirjibhai*, 37 Bom. 158; *Gordhandas v. Bai Ramcoover*, 26 Bom. 267; *R. D. Sethna v. Hemingway*, 38 Bom. 618; *Delaney v. Rohmat*, 32 Cal. 710. Even in a case governed by the Act an executor can file a suit before grant but he must obtain the probate before getting a decree, *Balakrishnudu v. Narayanasawmy*, 37 Mad. 175; *Kanhaiya Lal v. Munni*, 18 All. 260. An executor of the will of a person domiciled in a Native State to whom grant is made by the State cannot maintain an action on the grant and sue in British India for the recovery of a debt; he must obtain a fresh grant in British India, *Mfanasing v. Amad Kunhi*, 17 Mad. 14.

An administrator on the other hand, as he derives his authority from the grant of letters of administration cannot file a suit before the grant, *Phillips v. Hartley*, 3 C. & P. 121; *Adm.-General v. Lalit Mohan*, 12 C. W. N. 738; *Chandra v. Prasanna*, 38 Cal. 327 (P. C.), 38 I. A. 7. Limitation does not run against an administrator as in the case of an executor, *Soona Mayna v. Soona Navena*, 20 C. W. N. 833 (P. C.). The Bombay High Court, however, in the case of *R. D. Sethna v. Hemingway*, 38 Bom. 618 has allowed a suit by an administrator to be instituted before the grant.

Suit against heirs.—If a person dies leaving a will appointing executors but of which probate has not been granted any decree obtained against the heirs of the deceased is a nullity, *Sukh Nandan v. Rennick*, 4 All. 192; *Framji D. Ghaswala v. Adarji D. Ghaswala*, 18 Bom. 337; *Janaki v. Dhanu Lal*, 14 Mad. 454; *Matangini v. Chooneymoney*, 22 Cal. 903; see *contra Dinamoni v. Elahadut Khan*, 8 C. W. N. 843. But though the decree is a nullity a judgment against a person in possession of the estate of the deceased is at any rate sufficient to enable the plaintiff to bring a suit against an executor to have the decree satisfied, *Prosunno v. Kristo*, 4 Cal. 342. Also, if some of the heirs are sued and subsequently a grant is made to one of them the decree will be good, *Chuni Lal v. Osmond*, 30 Cal. 1044. Also, if the suit is for purposes other than those mentioned under sec. 212 the decree will be good, *Tuljaram v. Bamanji*, 19 Bom. 828.

If once grant is made then the executor or administrator is the only person competent to sue or be sued. See sec. 216.

Succession Certificate Act.—Although no probate or letters of administration are necessary in case of Hindus and Mahomedans formerly governed by the Probate and Administration Act still in case of debts due to the deceased, no decree will be passed against the debtor and no decree will be executed unless the plaintiff

produces (a) probate or (b) letters of administration or (c) a certificate under the Administrator Generals Act or (d) a certificate under Part X of this Act or (e) a certificate granted under the Succession Certificate Act VII of 1889 or (f) a certificate granted under Bombay Regulation VIII of 1827, *Narayan v. Tatia* 15 Bom. 580.

As to when a Succession Certificate is granted and to whom see Part X secs. 370 to 390 which part wholly reproduces the Succession Certificate Act VII of 1889. Sec. 214 is a sec. 4 of that Act which is placed in this part to bring it in conformity with the representative title of the grantee of the certificate to the property of the deceased.

The granting of a certificate does not determine any question of title or decide what property does or does not belong to the estate of the deceased. It merely enables the person to whom the certificate is granted to collect the assets belonging to the deceased and affords an indemnity to the debtor paying the same, *Waselun Hak v. Gowhurun*, 10 W. R. 105. The object of enacting this section is to enable the debtors to pay the debts due by them with safety to the representative of the deceased, *Frankisto v. Nobodip*, 8 Cal. 869. It is not necessary to have the certificate at the time of instituting the suit, what the section requires is that no decree shall be passed. Hence if a suit is instituted before the grant of certificate but if a certificate is produced at the hearing when the decree is passed, it will be sufficient, *Govindappah v. Kondappah*, 6 M. H. C. R. 131. The provisions of this section come into operation only in those cases where a debt due to the deceased is sought to be recovered through a Court of law. But a debtor may pay his debt to the executors or to the heirs of a Hindu or Mahomedan, though no probate or a certificate may have been obtained and such payment may operate as a discharge to the debtor, but care should be taken, when payment is made to an heir, to see that all the heirs sign the receipt, *Pathummabi v. Vittil*, 26 Mad. 734.

Execution of Decrees.—If a decree is passed and the decree holder dies, an application for execution may be made without the certificate but no process will be issued until the certificate is produced, *Govindappah v. Kondappah*, 6 M. H. C. R. 131; *Chimniram v. Hanmanta*, 15 Bom. 265; *Kalian Singh v. Ram Charan*, 18 All. 34. See, however, *Karam Ali v. Halima*, 1 All. 686, where it was held that a certificate was not necessary unless the Court feels doubt as to the right of the person to the representative title of the deceased, see also *Hotilal v. Hardeo*, 5 All. 212. If the decree is in favour of two persons and one of them dies the survivor can proceed to execute it without certificate, unless the debt due was part of the separate property of the deceased, *Raghavendra v. Bhima*, 16 Bom. 349.

What is a suit for Debt—The word "debt" in clause (2) has given rise to several decisions. A debt is a sum of money which is now payable or will become payable in future by reason of a present obligation. *Bancharam v. Adya Nath*, 13 C. W. N. 966, 36 Cal. 936 (F. B.). The test to be applied in ascertaining whether a particular claim falls within the definition of the word "debt" is to see whether the Court is called upon to pass a personal decree against the debtor, *Nanchand v. Yenawa*, 28 Bom. 630; *Sahadev v. Sheikh Sakhawat*, 12 C. W. N. 145. The word "debt" in the section is a comprehensive term which should receive a liberal construction, see *Annappurna v. Nalini*, 42 Cal. 10. A debt existing in the lifetime of the creditor but which becomes due after his decease comes within this section and the heirs of the creditor must obtain the certificate, *Bancharam v. Adya*

Nath, supra; see, however, *Nemdhari v. Mussummat Bissessari*, 2 C. W. N. 591. The Court need not inquire whether the debt is really due. All that the Court has to do is to ascertain the right of the person to the certificate, *Kashi v. Parbhu*, 5 Bom. L. R. 721.

A suit for refund of price for goods sold is a suit for "debt" and certificate is necessary, *Penta Reddi v. Anki Reddi*, 2 M. L. J. 34, 22 Mad. 44 (note). A suit for recovery of arrears of annuity is a suit for debt and certificate is necessary, *Jagan Nath v. Bageshwar*, (1899) A. W. N. 217. A suit to recover dower is a suit for debt and a certificate is necessary, *Abdul Karim v. Magbul-un-Nissa*, 30 All. 315; *Ghafur Khan v. Kalandari*, 8 A. L. J. 79; 33 All. 327; see, however, *Mohamed v. Sarifan*, 16 C. W. N. 231; *Shadi Jan v. Wabis Ali*, 43 All. 493; it was, however, held that no certificate was necessary in the case of a suit by one of the heirs of the wife of a Mahomedan to recover from one of the heirs of the husband the proportionate share of the wife's dower, the liability to pay which had devolved upon the defendant according to her share by inheritance in the property of the husband; see also *Sughra Begam v. Muhammad*, 43 All. 341. In a suit to recover debt if the plaintiff dies and another person is substituted in his place, it will be necessary for him to obtain a certificate, before a decree can be passed, *Nepusi v. Nasiruddin*, 27 C. L. J. 400. If the debt is assigned and the assignee sues for recovery of the debt, he must obtain the certificate, *Gulshan Ali v. Zakir Ali*, 42 All. 549; but in the case of a suit by the assignee from a person to whom a certificate is granted subsequent to the assignment no certificate is necessary, and the assignee is entitled to a decree without obtaining a certificate in his own name, *Arunachelam v. Mathu*, 42 Mad. 130.

As to whether a certificate can be granted in respect of a part of the debt, the decisions are conflicting. The Allahabad High Court has held that no certificate can be granted for collection of part only of a debt, as it would lead to multiplicity of suits, *Muhammed v. Puttan Bibi*, 19 All. 129; *Ghafur Khan v. Kalandari*, 33 All. 327; *Sughra Begum v. Muhammad*, 43 All. 341. The Calcutta High Court, however, has held the contrary, viz., that a certificate can be granted in respect of a part of the debt, *Annapurna v. Nalini*, 42 Cal. 10.

What is Not a suit for debt.—A suit for account is not a suit for debt, *Bissessar v. Durgadas*, 32 Cal. 418; *Sahju v. Noordin*, 22 Mad. 139. A suit for recovery of rent is not a suit for debt, *Nagendra v. Satadal*, 26 Cal. 536; *Ranchordas v. Bhagubhai*, 18 Bom. 394. A decree for foreclosure is not a "debt" so as to require a certificate, *Ammanna v. Gurumurthi*, 16 Mad. 64; *Hanvant v. Mithana*, (1900) A. W. N. 94. A suit for sale of the mortgage property is not a suit for "debt," *Kanchan v. Baij Nath*, 19 Cal. 336; *Palaniyandi v. Veerammal*, 29 Mad. 77; *Nanchand v. Yenara*, 28 Bom. 630; *Arumugam v. Valuba*, 24 Mad. 22; *Umesh Chandra, v. Athathura*, 28 Cal. 246. The Allahabad High Court, however, in a full bench case, (*Futeh Chand v. Muhammad*, 16 All. 259) held that a certificate is necessary in a suit for sale under sec. 88 of the Transfer of Property Act. But if the mortgaged property is sold and the application is for a personal decree against the mortgagor, then a certificate is necessary, *Sahadev v. Sheikh Sakhawati*, 12 C. W. N. 145. No certificate is necessary to enforce a charge on immoveable property, *Kanchan v. Baij Nath*, 19 Cal. 336.

In the case of a family governed by the Mitakshara law a son can maintain an action without certificate to recover a debt due to the joint-family, *Sital Proshad v. Kaifut*, 26 C. W. N. 488; but it must be proved that the debt is a joint-family debt, *Ramchander v. Bapu*, 16 Bom. 240; *Pateshuri v. Bhagwati*, 17 All. 578; see also *Vaidyanatha v. Chinnasami*, 17 Mad. 108; *Subramanian v. Bakku*, 20 Mad. 232; *Pallamaju v. Bapanna*, 22 Mad. 380. A certificate is also not required in the case of a debt due to a Hindu when the right to recover the debt survives, *Vithal v. Gotya*, 1 Bom. L. R. 197. But if the property is self acquired a certificate is necessary, *Vairavan v. Srinivasachariar*, 44 Mad. 499. Also, if the suit is on a promissory note which stands in the name of the father alone and the son sues, he must obtain the certificate, *Pera Reddi v. Mohamed*, 1 M. L. J. 702.

215. (1) A grant of probate or letters of administration in respect of an estate shall be deemed to supersede any certificate previously granted under Part X or under the Succession Certificate Act, 1889, or Bombay Regulation No. VIII of 1827, in respect of any debts or securities included in the estate.

Effect on certificate of subsequent probate or letters of administration.

(2) When at the time of the grant of the probate or letters any suit or other proceeding instituted by the holder of any such certificate regarding any such debt or security is pending, the person to whom the grant is made shall, on applying to the Court in which the suit or proceeding is pending, be entitled to take the place of the holder of the certificate in the suit or proceeding :

Provided that, when any certificate is superseded under this section, all payments made to the holder of such certificate in ignorance of such supersession shall be held good against claims under the probate or letters of administration.

(This is sec. 152 of the Probate and Administration Act No. V of 1881 and sec. 21 of the Succession Certificate Act No. VII of 1889).

216. After any grant of probate or letters of administration, no other than the person to whom the same may have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, throughout the province in which the same may have been granted, until such probate or letters of administration has or have been recalled or revoked.

Grantee of probate or administration alone to sue, etc., until same revoked.

(This is sec. 260 of the Succession Act X of 1865 and sec. 82 of the Probate and Administration Act V of 1881)

COMMENTARY.

In the commentary to sec. 214 the subject of suit by or against an executor or administrator before the grant is dealt with (see p. 237). This section deals with the subject after the grant and provides that if once grant is made then the executor or

administrator is the only competent party to sue or be sued, *Purshottam v. Kala*, 26 Bom. 301; *Satya v. Motilal*, 27 Cal. 683; *Narasimmulu v. Gulam Hussain*, 16 Mad. 71; *Chidambara v. Krishnasami*, 39 Mad. 365.

In *Malapa v. Devi*, 21 Bom. 102, it was held that an administrator appointed under sec. 10 of Regulation VIII of 1827 did not become the legal representative, but see *contra Mir Ibrahim v. Ziaulnissa*, 12 Bom. 150, where it was held that so long as an appointment under sec. 9 of the Regulation lasted no one else could represent the estate.

PART IX.

Probate, Letters of Administration and Administration of Assets of Deceased.

217. Save as otherwise provided by this Act or by any other law for the time being in force, all grants of probate and letters of administration with the will annexed and the administration of the assets of the deceased in cases of intestate succession shall be made or carried out, as the case may be, in accordance with the provisions of this Part.

(This is sec. 2 of the Succession Act X of 1865 and secs. 2 and 150 of the Probate and Administration Act V of 1881.)

CHAPTER I.

Of Grant of Probate and Letters of Administration.

218. (1) If the deceased has died intestate and was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.

(2) When several such persons apply for such administration, it shall be in the discretion of the Court to grant it to any one or more of them.

(3) When no such person applies, it may be granted to a creditor of the deceased.

(This is sec. 23 of the Probate and Administration Act V of 1881.)

COMMENTARY.

In cases of intestacy of Hindus, Muhammadans and exempted persons the grant of letters may be made to any person entitled to the whole or any part of the estate of the deceased and when several persons apply the Court has discretion to grant to all or any one of them. In exercising such discretion, the Court always prefers a sole administrator to joint administrators, male to a female, a man accustomed to business to one who is not and whole blood to half blood. In *Nittyo Kali v. Kedar Nauth*, 5 C. L. R. 368, where two widows applied for grant, the Court granted only to one. See also *Raghu Nath v. Musst Pate Koer*, 6 C. W. N. 345.

If no person applies then the letters of administration may be granted to a creditor of the deceased.

As regards Europeans and Parsis there are special rules for grant of administration to persons entitled. (See sec. 219 which reproduces secs. 200 to 207 of the Succession Act X of 1865).

219. If the deceased has died intestate and was not a person belonging to any of the classes referred to in section 218, those who are connected with him, either by marriage or by consanguinity, are entitled to obtain letters of administration of his estate and effects in the order and according to the rules hereinafter stated, namely :—

Where deceased is not a Hindu, Muhammadan, Buddhist, Sikh, Jaina or exempted person.

(a) If the deceased has left a widow, administration shall be granted to the widow, unless the Court sees cause to exclude her, either on the ground of some personal disqualification, or because she has no interest in the estate of the deceased.

Illustrations.

(i) The widow is a lunatic or has committed adultery or has been barred by her marriage settlement of all interest in her husband's estate. There is cause for excluding her from the administration.

(ii) The widow has married again since the decease of her husband. This is not good cause for her exclusion.

(b) If the Judge thinks proper, he may associate any person or persons with the widow in the administration who would be entitled solely to the administration if there were no widow.

(c) If there is no widow, or if the Court sees cause to exclude the widow, it shall commit the administration to the person or persons who would be beneficially entitled to the estate according to the rules for the distribution of an intestate's estate :

Provided that, when the mother of the deceased is one of the class of persons so entitled, she shall be solely entitled to administration.

(d) Those who stand in equal degree of kindred to the deceased are equally entitled to administration.

(e) The husband surviving his wife has the same right of administration of her estate as the widow has in respect of the estate of her husband.

(f) When there is no person connected with the deceased by marriage or consanguinity who is entitled to letters of administration and willing to act, they may be granted to a creditor.

(g) Where the deceased has left property in British India, letters of administration shall be granted according to the foregoing rules, notwithstanding that he had his domicile in a country in which the law relating to testate and intestate succession differs from the law of British India.

(This section reproduces sections 200 to 207 of the Succession Act X of 1865. It applies to Europeans, Indian Christians and Parsis).

COMMENTARY.

Order in which Letters of Administration are Granted.—Only those who are connected with the deceased by marriage or by consanguinity are entitled to obtain letters of administration in the order following:—

(a) Widow or husband. In case of a widow the Judge may, if he think proper, associate with her any person entitled to administration after her, (clause b).

A widow is not entitled to letters of administration in the following cases:—

(i) If she has no interest in the estate of the deceased, *e. g.*, if she has barred herself of all her interest by a marriage settlement.

(ii) If she is a lunatic.

(iii) If she has misconducted herself.

(iv) If she is divorced. (*Re Nares*, 13 P. D. 35).

The fact of a widow having married again is no objection to her being entitled to letters of administration. [Ill. ii., Cl. (a)]. If, however, the deceased left children, the second marriage *might* induce the Court to prefer the child, *Webb v. Needham*, 1 Add. 494.

(b) Child or children. When there are sons and daughters, the practice of the Court is that a son is preferred to a daughter, unless there are material objections to him.

(c) Grandchild or Grandchildren.

(d) Great-grandchildren.

(e) Father.

(f) Mother.

(g) Brothers and Sisters.

- (h) Grandfather and Grandmother.
- (i) Uncles, aunts, nephews, nieces, great-grandparents.
- (j) Cousins.
- (k) Creditor.

NOTE.—In England a creditor is entitled to administration even when his debt is barred by limitation, *Coombs v. Coombs*, 1 P. & D. 288. In India it would seem that the Court would not grant letters of administration to a creditor whose debt is barred by limitation under the Limitation Act. Before a grant of letters of administration be made to a creditor, citation must be issued to the next-of-kin of the deceased. A person who has bought up a debt after the death of the deceased is not a creditor within the meaning of the section and letters of administration will be refused to him, *Deput v. Delerieleuse*, 2 Sw. & Tr. 131; *Downward v. Dickinson*, 3 Sw. & Tr. 564. But a surety who, after the death of the principal, pays off the debt, is entitled to be regarded as a creditor so as to be entitled to letters of administration, *Williams v. Jukes*, 34 L. J. P. & M. 60. Where more creditors than one apply, the grant will be made to one who has largest claim, *Ernest v. Eustace*, 1 Deane 273. Letters may be granted to a creditor although the liabilities of the deceased may be greater than the assets, *In the goods of Makhan Lall*, 15 C. W. N. 350.

For want as well of creditors as of next-of-kin the Court may grant letters of administration to any person at its discretion, or the Court may grant to a stranger letters *ad colligendum bona defuncti*, to gather up the goods of the deceased. (Williams on Executors, 10th Edn., pp. 354-355).

Under the Administrator-General's Act No. III of 1913, sec. 8, the Administrator-General shall have a right to letters of administration other than letters *pendente lite* in preference to that of (a) a creditor, (b) a legatee other than a universal legatee, or (c) a friend of the deceased.

Those who stand in equal degree of kindred to the deceased are equally entitled to administration. But in practice the Court takes the following into consideration:—

The Court always prefers a sole administration to a joint administration, and even where several persons stand in the same degree of kinship it is the rule to select one only, the selection being according to certain recognised principle. The interest of the estate and the interest of the parties entitled thereto must be primarily looked to. Other things being equal the Court prefers—

- (a) Males to females, son to daughter.
- (b) A man accustomed to business is preferred to one who is not.
- (c) Whole blood is preferred to half blood.
- (d) Where none of these tests can be applied the Court frequently appoints the applicant who is first in the field, *Stoney v. Stoney*, 2 Pat. 508 at 512.

Letters of Administration of the Estate of Bastards.—Where a bastard dies leaving a widow but no children, under the Succession Act she is entitled to the whole of her husband's property. According to English law she takes one half and the other half goes to the Crown. The widow is, therefore, entitled to administration.

If the bastard dies intestate leaving no relations, letters of administration are ordinarily granted to the Administrator-General. For further particulars as to the distribution of the estate of a bastard see notification dated 31st March 1873, Gazette of India, 5th April 1873, Part IV, p. 334.

Letters of Administration in case of Foreigners.—If the deceased has left property in British India, letters of administration must be granted according to the foregoing rules, although the deceased may have had his domicile in a country in which the law relating to the testate and intestate succession differs from the law of British India.

The grant of administration by a foreign Court or even by a Court in the British dominions outside British India is not sufficient.

It has already been stated (*see ante*, pp. 13-14), that although the right of succession to the moveable property of an intestate is to be regulated by the law of the country in which he was domiciled at the time of his death yet the administration of his estate must be according to the law of British India. [Sec. 324 (1)].

If a foreign executor or administrator in a country other than the country in which the grant is made desires to maintain an action he must obtain new letters of administration; he cannot maintain an action merely by virtue of the probate or letters of administration granted to him in the country of the domicile of the deceased. (See Storey's Conflict of Laws, 8th Edn., p. 512.)

Native States.—In the case of grant by Native States the same principles apply. The British Courts will not recognise a grant made by a Native State, *Manasing v. Amad Kunhi*, 17 Mad. 14.

220. Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death.

Effect of letters of administration.

(This is sec. 191 of the Succession Act X of 1865 and sec. 14 of the Probate and Administration Act V of 1881).

COMMENTARY.

(See next section.)

221. Letters of administration do not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate.

Acts not validated by administration

(This is sec. 192 of the Succession Act X of 1865 and sec. 15 of the Probate and Administration Act V of 1881).

COMMENTARY.

As the administrator derives his title from the Court, the property of the deceased vests in him only from the time of the grant, *Woolley v. Clark*, 5 B. & A. 745, 746. (Williams on Executors, 10th Edn., p. 469). In the case of an executor the property vests in him from the time of the testator's death. The effect of sec. 220 is not to vest the property of the deceased in the administrator as from the dat

of death. The heirs may deal with the property until the grant is made, *Antony v. Makis*, 34 Mad. 395. The property vests only at the time of the grant, though for certain purposes the grant may relate back to the death of the deceased. For example, an administrator may have an action of trespass or trover for the goods of the intestate by one before the letters are granted to him; otherwise there would be no remedy for this wrong-doing, *Tharpe v. Stallwood*, 5 M. & Gr. 760; *Foster v. Bates*, 12 M. & W. 226. It is only in those cases where the act is for the benefit of the estate that the relation back exists. But once the letters of administration are granted the interest of the administrator in the property of the deceased is equal to the interest of an executor. (As to other differences between the authority of an executor and that of an administrator see what an executor and an administrator can do before grant, *post*, p. 255).

But in all cases the *title* of the administrator to the property of the intestate, though it does not exist until the grant of letters of administration, relates back to the time of the intestate's death, *Foster v. Bates*, 12 M. & W. 226. If a creditor files a suit against the heirs of the deceased and obtains a decree and if letters of administration are subsequently granted to other person the decree is a nullity, *Sukh Nandan v. Rennick*, 4 All. 192; *Framji D. Ghaswala v. Adarji D. Ghaswala*, 18 Bom. 337.

Probate only to appointed executor

222. (1) Probate shall be granted only to an executor appointed by the will.

(2) The appointment may be expressed or by necessary implication.

Illustrations.

(i) A wills that C be his executor if B will not B is appointed executor by implication.

(ii) A gives a legacy to B and several legacies to other persons, among the rest to his daughter-in-law C, and adds "but should the within-named C be not living I do constitute and appoint B my whole and sole executrix." C is appointed executrix by implication.

(iii) A appoints several persons executors of his will and codicils and his nephew residuary legatee, and in another codicil are these words,—“I appoint my nephew my residuary legatee to discharge all lawful demands against my will and codicils signed of different dates.” The nephew is appointed an executor by implication.

[Clause (1) is sec. 181 of the Succession Act X of 1865 and sec. 6 of the Probate and Administration Act V of 1881 with the alteration of the word "can" into "shall." Clause (2) is sec. 182 of the Succession Act X of 1865 and sec. 7 of the Probate and Administration Act V of 1881. The word "expressed" is not happy. The corresponding word in the Probate and Administration Act is "express."]

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Probate must be granted to an executor and the Court has no discretion to refuse probate on the ground that in its opinion the applicant is not a fit person to be appointed executor, *Hara Coomur v. Doorgamoni*, 21 Cal. 195.

Of what instruments probate may be granted.—Probate can only be granted of instruments which are of a testamentary nature. Probate can be granted of a portion only of the will to the extent to which the contents are proved where other portion is lost, *Kedar Nath v. Sirojini*, 26 Cal. 634. A paper which neither disposes of property nor appoints an executor, generally speaking, has no testamentary character and no probate thereof can be granted, *Van Straubensee v. Monck*, 3 Sw. & Tr. 6. A codicil which merely revokes all former wills is of a testamentary nature and ought to be admitted to probate, *Brenchley v. Still*, 2 Robert. 162. If a testamentary paper is discovered after the probate is granted to an executor, the executor must bring it into Court for probate even though it be a mere confirmation of the will already proved, *Weddall v. Nixon*, 17 Beav. 160. A will made by a Hindu disposing of ancestral property only, is entitled to probate and the Court is not justified in refusing probate because the testator had no power to dispose of property, *Barot Purshottam v. Bui Muli*, 18 Bom. 749. It is not the duty of the Court in entertaining an application for probate to consider an issue as to the title of the testator to the property the will deals with or to consider whether the testator had power to dispose of it, *Nanhu v. Samirani*, 8 C. H. C. R. 237; *Birj Nath v. Chandur Mohan*, 19 All. 458; *Ocharrani v. Dolatram*, 6 Bom. L. R. 966; *Chintamani v. Ramchandra*, 34 Bom. 589. Upon a *bona fide* application for probate it is not the province of the Court to go into question of title with reference to property of which the will purports to dispose. The grant does not prejudice the rights of any person who claims any such property, *Behary Lal v. Juggo Mohun*, 4 Cal. 1. An instrument appointing an executor is entitled to probate though the executor may renounce probate, *O'Dwyer v. Geare*, 1 Sw. & Tr. 465.

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Of what instruments probate cannot be granted.

notes and alterations made by the testator in his will which are unattested cannot be admitted to probate, *Sardar Nowroji v. Pullibai*, 15 Bom. L. R. 352. Probate may be granted of a part of the will and the other parts omitted if they are not proved to have been prepared under instructions from the testator, *Hormasjee K. Sethna v. Dhanjishaw R. Lalcaca*, 12 Bom. L. R. 569.

One of the invariable tests in coming to a conclusion as to the testamentary character of a paper is to see whether the paper is revocable, *Rojammal v. Authiammal*, 33 Mad. 304. A document which is plainly intended to be operative immediately and to be final and irrevocable is a non-testamentary instrument and probate cannot be granted of such an instrument, *Umrao Singh v. Lachhman Singh*, 13 Bom. L. R. 404 (P. C.).

Under the Probate and Administration Act, probate may be granted of a nuncupative will, *Gokul Chand v. Mangal Sen*, 25 All. 313; *In the will of Haji Mahomed Abba*, 24 Bom. 8; *Mariambai v. Hasam*, 1 Bom. L. R. 715. Such a Will is admitted to probate under the ordinary practice of the Court, and in granting the probate the only question to be considered is whether the will is a fabrication or not, *Gokuldas v. Purushotamdas*, 1 Bom. L. R. 470.

Who is Capable of Being an Executor.—Any person may be appointed executor.

(1) The King may be constituted executor in which case he appoints such person as he shall think proper to execute the will.

(2) A corporation aggregate may be appointed executor in which case they appoint persons styled Syndics to receive *letters of administration* with the will annexed, *In the goods of Darke*, 1 Sw. & Tr. 516.

(3) A corporation sole may be appointed executor, *In the goods of Haynes*, 3 Curt. 75.

(4) A partnership firm may be appointed executor and in the absence of anything in the will to the contrary, it is only those members of the firm who were members at the date of the will are entitled to probate. (Coote's Probate Practice, 15th Edn., p. 67). In the recent case of *In the goods of George Nash*, 29 C. W. N. 373, it was held that when a member of the firm is appointed executor the member who applies for probate must show that he was a member of the firm at the date of the will and at the date of the death of the testator. If a solicitor's or a trading firm be appointed executors the appointment only applies to the members of the firm at the date of the will, unless a contrary intention is expressed in the will, *In the goods of Fernie*, 6 Notes of Cas. 657.

(5) An alien is capable of being an executor.

(6) A minor may be appointed executor and even a child *en ventre sa mere*. But probate cannot be granted to a minor. (Sec. 223). A Succession Certificate can be granted to a minor, *Krishnama v. Venkammah*, 36 Mad. 214. If the minor is sole executor or sole residuary legatee letters of administration with the will

annexed may be granted to the legal guardian of such minor limited during his minority. Probate of the will shall be granted to him after he shall have completed the age of 18 years and not before. (Sec. 244).

(7) A bankrupt or an insolvent may be executor, and the Court cannot refuse to grant probate to such person on account of his poverty or insolvency, provided that the testator knew that the person was a bankrupt or insolvent when the testator executed the will. If the commission of the act of insolvency was subsequent to the execution, the Court would control the action of such executor by refusing probate or by the appointment of a receiver. (See Mortimer on Probate, p 234).

(8) A person of unsound mind or *non compos mentis* may be executor, but probate will not be granted to such person. Letters of administration with the will annexed may be granted to his committee limited until he shall become of sound mind. (Sec. 246).

(9) A married woman may be appointed executrix, but probate cannot be granted to her without the previous consent of her husband (except under the Probate and Administration Act when no consent of the husband is necessary). When probate or letters of administration have been granted to a married woman she has all the powers of an ordinary executor or administrator. (Sec. 315).

(10) The Official Trustee may be appointed executor. *In the goods of Manick Lal Seal*, 35 Cal. 156. But see the contrary decision of Jenkins, C. J., in *Grey v. Charusila*, 38 Cal. 53, where it was held that the Official Trustee as constituted by Act XVII of 1864 is not entitled by virtue of his office and in his character as Official Trustee to be executor or administrator and as such to obtain a grant of probate. (Williams on Executors, 10th Edn., pp. 158-164).

Of the Appointment of Executors.—The appointment of an executor may be express or implied. An executor can derive his office only from a testamentary appointment, *Hamidas v. Baminji*, 7 B. H. C. R. 64, (a. c. j.). The testator may himself appoint or ask another to appoint an executor, *Moosa Haji v. Haji Abdul*, 5 Bom. L. R. 639; *In re Cringan*, 1 Hagg. 548; and the person to whom such power is given may appoint himself executor, *In the goods of Ryder*, 2 Sw. & Tr. 127. When a testator has omitted to appoint an executor the Court will appoint as executor the person whom it would appear from the tenor of the will the testator contemplated should be executor, *In the goods of Courjon*, 25 Cal. 65.

An executor by implication is usually called *executor according to the tenor*. To constitute an executor according to the tenor it must appear from the will that the testator intended that he should collect his assets, pay his debts, and generally administer his estate, (Williams on Executors, 10th Edn., P. 163), *In the Matter of Radha Monohur Mookerjee*, 5 Cal. 756; *In the goods of Punchard*, L. R. 2 P. & D. 369; *Mithibati v. Canji*, 26 Bom. 571. He must have a general power to receive and pay what is due to the estate. A direction to pay the testator's debts or funeral expenses out of a particular fund and not out of the general estate will not do, *Kuppuswami v. Ammini* 22 Mad. 345; *Mithibati v. Canji*, 26 Bom. 571; *Sayaji v. Mutturabai*, 6 Bom. L. R. 78, nor a mere bequest of all the property including the debts of the testator *Ex parte*, *Vistal*, 15 Mad. 360. Where property

is left by will to trustees they will not be entitled to probate as executors according to the *tenor*, unless it appears from the will that they have to discharge such duties as the executors have to perform, *Appacooty v. Aluthu*, 30 Mad. 191; *Harilal v. Bai Mani*, 29 Bom. 351. A mere direction that the person appointed should take care of the property during the minority of the son of the testator will not constitute him an executor according to *tenor*, *Seshamma v. Chennappa*, 20 Mad. 467; *Gopal Dass v. Budree Dass*, 33 Cal. 657.

An executor may be appointed by necessary implication, as where the testator says, "I will that C be my executor, if B will not." In this case B may be admitted, if he please, into the executorship. (Ill. *i.*, see also illustrations *ii.*, and *iii.*) Or, if the testator, supposing his child, his brother, or his kinsmen to be dead, say in his will, "For as much as my child, my brother, etc., is dead, I make A B executor." In this case if the person whom the testator thought dead be alive, he shall be the executor.

When there is an express appointment of an executor, it is less probable that there should be an executor according to the *tenor*. But if there is one he will be entitled to probate jointly with an executor expressly nominated, *Powell v. Stratford*, 3 Phillim. 118.

The mere appointment of a universal legatee will not constitute the legatee an executor according to the *tenor* and the practice of the Court is, when there is no executor appointed expressly to grant to the universal legatee, not the probate of the will, but letters of administration with the will annexed, *Ex-parte, Vittal*, 15 Mad. 360; *Goods of Shoshee Bhusan Bannerjee*, 19 Cal. 582.

Instituted and Substituted Executors.—A testator may appoint several persons to act as executors; but in law they may be considered in the light of one individual person. Likewise a testator may appoint several persons as executors in *several degrees*; as where he makes his wife executrix, but if she will not, or cannot be executrix, then he makes his son (B) executor; and if his son will not or cannot be executor then he makes his brother (C), and so on. In such a case the wife is said to be *instituted executor* in the first degree, B is said to be *substituted* in the second degree, and C to be substituted in the third degree, and so on. So also a testator may appoint an executor and provide that in case of his death another should be substituted and the latter will be entitled to prove the will on the death of the first, even if the first had proved the will, *Mithibai v. Canji*, 26 Bom. 571; *Hormusji v. Dhanbaiji*, 12 Bom. 164. If the instituted executor once accepts the office and afterwards dies intestate the substitutes in what degree soever are all excluded, because the condition of law (if he will not or cannot be executor) was once accomplished by such acceptance of the instituted executor. But where a testator appoints an executor and provides that *in case of his death*, another should be substituted, on the death of the original executor, although he has proved the will, the executor so substituted may be admitted to the office, if it appears to have been the testator's intention that the substitution should take place on the death of the original executor whether happening in the testator's lifetime or afterwards. (Williams on Executors, 10th Edn., pp. 171-172), *In the goods of Lighton*, 1 Hagg, 235; *In the goods of Foster*, L. R. 2 P. & D. 304,

Absolute and Qualified Appointment.—The appointment of an executor may be either absolute or qualified.

It may be *absolute* when he is constituted certainly, immediately, and without any restriction in regard to the testator's effects or limitation in point of time.

It may be *qualified by limitations*:—

(a) As to the time when the executor shall begin to exercise his office, *e. g.*, upon the death or marriage of his son or on the expiration of five years from his death, or,

(b) As to when he shall cease to act, *e. g.*, during the minority of his son or widowhood of his wife, or,

(c) It may be *limited in point of place*, *e. g.*, the testator may make A his executor for his goods in Cornwall, B for those in Devon, C for those in Somerset, or,

(d) It may be *limited as to the subject matter*, *e. g.*, a testator may make A his executor for his plate and household stuff, B for his sheep and cattle, C for his leases and estates, D for his debts, or,

(e) The *appointment may be conditional* either precedent or subsequent, *e. g.*, a condition that the person named executor shall give security to pay the legacies and to perform the other acts. (Williams on Executors, 10th Edn., pp. 175-179).

Co-adjutors or Overseers.—The testators sometimes nominate persons to assist and advise the executors appointed by them in the discharge of their duties. Such persons are termed co-adjutors or overseers. The co-adjutor has no power to administer or to intermeddle with the estate. His function is to watch and advise and if he finds any neglect or miscarriage in the administration by the executors, it is his function to bring it to the notice of the Court, *Brojo Chunder v. Raj Kumar*, 6 C. W. N. 310; *The Eastern Mortgage and Agency Ltd. v. Rebati Kumar Roy* 3 C. L. J. 260. In *Sayaji v. Muttumabai*, 6 Bom. L. R. 78, the testator by his will directed that "my wife L shall act according to the advise of S. & D."; it was held that L was appointed executor according to the tenor and S. & D. were merely co-adjutors. (See Williams on Executors, 10th Edn., p. 169).

223. Probate cannot be granted to any person who is a minor or is of unsound mind, nor, unless the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, to a married woman without the previous consent of her husband.

Persons to whom probate cannot be granted

(This is sec. 183 of the Succession Act X of 1925 and sec. 8 of the Probate and Administration Act V of 1951).

COMMENTARY.

To whom Probate cannot be granted.—(1) Probate cannot be granted to an executor who is a minor.

(2) Probate cannot be granted to an executor who is of unsound mind.

(3) Probate cannot be granted to a married woman executrix without the previous consent of her husband.

(As regards Hindu and Mahomedan married woman probate can be granted to a married woman executrix without the consent of her husband).

This is a relic of the old law of the disabilities of a married woman. It is difficult to understand why this disability should have been continued in regard to the advanced community when the Hindu and Mahomedan women are freed from it. As to the power of the Court to dispense with the consent of the husband the following judgment was delivered in the Bombay High Court by the Hon'ble Mr. Justice Shah in the matter of the Petition for Probate of the will of Ratanji Rustomji Desai on 30th July 1925: "The question whether the Court has the power to dispense with the consent of the husband in the case of a married woman required by the section is not easy. It appears from the instances mentioned in Henderson's Law of Succession, 4th Edition, edited by Kinney (1922) in the circumstances on s. 183 of the Indian Succession Act that the Calcutta High Court has under certain circumstances dispensed with the consent of the husband at least in one case. I have not been able to find any instance of this character in this Court and none has been brought to my notice. It seems to me, however, that there may be clear cases in which it may be practically impossible to obtain the consent of the husband and it may amount to a denial of the right of the wife if the probate cannot be granted without such consent. The point is not free from difficulty and I have not had the benefit of argument as in a contested case. After a careful consideration of the point it seems to me that where the circumstances clearly justify dispensing with the consent of the husband the Court can do so. In England the consent of the husband is no longer necessary. (See Williams on Executors, 11th Edition, pp. 154, 365 and 489 & 724) There is no provision in the Married Women's Property Act (III of 1874) corresponding to sections 1 and 24 of the Married Women's Property Act of 1882 in England and I do not think that section 7 of the Indian Act can be read as modifying S. 183 of the Indian Succession Act. No such consent is required under the corresponding provision of the Indian Probate & Administration Act (see sec. 8 of Act V of 1881). It is possible that the Legislature may consider it desirable to place this point beyond doubt and controversy by modifying this provision so as to bring it in conformity with the rule of English Law on the point.

I have, however, to take the sec. as it stands. I hold not without hesitation that it is open to the Court to dispense with the consent of the husband if the Court is clearly satisfied that it is practically impossible for the wife to obtain such consent without any apparent fault on her part. I am satisfied in this case that she has been living separate from her husband for many years and does not know the whereabouts of her husband.

Under the circumstances I direct that the consent of the husband be dispensed with in this case.

In making this order, I am influenced by the view apparently taken by Harrington, J. in relation to *Goods of Lambert* as stated in the commentary above referred to."

(4) Probate cannot be granted to an executor who has renounced his executorship. (See sec 230).

Grant of probate to several executors simultaneously or at different times

224. When several executors are appointed, probate may be granted to them all simultaneously or at different times.

Illustration

A is an executor of B's will by express appointment and C an executor of it by implication. Probate may be granted to A and C at the same time or to A first and then to C, or to C first and then to A.

(This is sec. 184 of the Succession Act X of 1865 and sec. 9 of the Probate and Administration Act V of 1881).

COMMENTARY.

An executor may be appointed solely or in conjunction with others; but in the latter case they are all considered in law in the light of an individual person. If all executors do not apply for probate the practice is to grant probate to those who apply reserving the right of the others to come in and prove the same, *Pran Nath v. Jadu Nath*, 20 All. 189. If executors are appointed jointly the practice of the Bombay High Court is to admit the petition either on the other executor joining in the petition or renouncing, *In the Estate of Arthar Boston Rockley*, Petition dated 16th September 1925. As a matter of fact, however, probate granted to one of several executors enures for the benefit of all, whether the power is reserved to them or not, *Webster v. Spencer*, 3 B. & Ald. 363; *Jehangir v. Kukibai*, 27 Bom. 281.

Where the power is reserved the practice is to take out what is called a **Double Probate** which is in this manner:—The first executor that comes in takes probate in the usual form with reservation to the rest. Afterwards, if another comes in, he also is to be sworn in the usual manner and an engrossment of the original will is to be annexed to such probate in the same manner as the first and in the second grant such first grant is to be recited, and so on if there are more that come in afterwards. (Williams on Executors, 10th Edn., p. 295). The Court has no discretion to refuse probate to an executor who subsequently applies for probate on the ground that probate has been granted to another executor, *Hara Coomar v. Dourgamonji*, 21 Cal. 195.

If there be several executors appointed with distinct powers, as one for one part of the estate and another for another, yet there be but one will to be proved, one proving of it suffices, e. g., if B is made executor for ten years and afterwards C is to be executor and B proves the will and the ten years expire, C may administer without any further probate. (Williams on Executors, 10th Edn., pp. 295-296).

The grant of probate to one of several executors empowers the executor to whom it is granted with all the powers in spite of the fact that the testator intended that all his executors should join in alienating the property, *Satya Prashad v. Motilal*, 27 Cal. 683.

225. (1) If a codicil is discovered after the grant of probate, a separate probate of that codicil may be granted to the executor, if it in no case the appointment of executors made

Separate probate of codicil discovered after grant of probate.

only some of those which relate to suits. He may do the following acts before obtaining probate.

(1) He may seize and take in his hands the testator's effects.

(2) He may pay or take releases of debts owing from the estate and may receive debts owing to the estate.

(3) He may distrain for rent due to the testator.

(4) He may sell, give away, or dispose of the goods, chattels, and effects of the testator, but the purchaser is not bound to pay his purchase-money until probate has been obtained, *Newton v. Metropolitan Railway Co.*, 1 Dr. & Sm. 583.

(5) He may assent to or pay legacies.

(6) He may institute a suit before obtaining probate, (see *ante* p. 237).

(7) An executor can be a petitioning creditor in insolvency proceedings, but he must obtain probate before an adjudication order is made, *Ex-parte Paddy*, 3 Madd. 241; *Rogers v. James*, 7 Taunt. 147.

(8) An executor of a creditor of a company may present a winding up petition under the Companies Act before he has obtained probate, but he must obtain probate before the hearing of the petition, *Re Masonic & General Life Assurance Co.*, 32 C. D. 373.

(9) If an executor has elected to administer the estate, he may be sued in law or in equity by the deceased's creditors to whom as a executor *de jure* or *de facto* he has made himself responsible. A residuary legatee also may sue him for an account of the estate and effects of the testator.

If an executor die before probate is obtained any of these acts done without proving the will stand firm and good. (Williams on Executors, 10th Edn., pp. 220-227).

What an Administrator may not do before Letters of Administration are granted.—Unlike an executor who derives his authority from the will an administrator derives his authority from the grant and the general rule is that he can do nothing as administrator before letters of administration are granted to him.

(1) An administrator cannot file a suit or commence an action before grant. (See *ante*, p. 237).

(2) An administrator cannot release an action or release a debt before grant. An executor can, *Middleton's Case*, 5 Co. 28 b.

(3) An administrator cannot assign the property of the deceased before grant. An executor can, *Bacon v. Simpson*, 3 M. & W. 87.

(4) An administrator cannot surrender a lease, *Doe v. Glenn*, 1 Adol. & Ell. 49.

(5) A notice given by an administrator before he has obtained letters of administration is not valid, *Holland v. King*, 6 C. B. 727.

(6) An administrator, it would seem, cannot effect a valid mortgage before grant, *Mellers v. Brown*, 1 H. & C. 686. An executor can.

Generally it may be observed that only such acts as are done by the administrator before grant which are beneficial to the estate will be binding and valid. (Williams on Executors, 10th Edn., pp. 314-318).

Effect and Consequence of Grant of Probate.—JUDGMENT IN REM.—

The grant of probate is the decree of the Court which no other Court can set aside except for fraud or want of jurisdiction, *Komolachun v. Nilruttun*, 4 Cal. 360; *Hormusji v. Dhanbaiji*, 12 Bom. 164; *Birat Parshotam v. Bai Muli*, 18 Bom. 749. The judgment of a Court of probate granting or refusing probate is a judgment in rem (sec. 41 of the Evidence Act), *Chinnasami v. Hariharabadra*, 16 Mad. 380. As a judgment in rem it is binding upon all the world and is conclusive as to the point actually decided, *Concha v. Concha*, 11 A. C. 541. According to sec. 41 of the Evidence Act a final judgment of a competent Court of probate is a judgment in rem only when it confers or takes away the legal character within the provisions of that section. Therefore probate when granted or refused is only conclusive against all the world in regard to the following:—

(a) The due execution of the will according to the law of the country where it is proved, *Whicker v. Hume*, 7 H. L. C. 124.

(b) As to the validity and contents of the will and is conclusive as to every part thereof of which probate is granted, *Hormusji v. Dhanbaiji*, 12 Bom. 164; *Chintaman v. Ramchandra*, 34 Bom. 589; *In re Bhobosoonduri*, 6 Cal. 460. It gives no efficacy to the provisions of the will, it is merely a proof of its contents, *Khaw Sim, Tek v. Chuah Ghoh*, 25 Bom. L. R. 121 (P. C.).

(c) The appointment of executors, *Griffiths v. Hamilton*, 12 Ves. 293; *Bal Gangadhar Tilak v. Sikwarbai*, 26 Bom. 792; *Raghu Nath v. Musst Pate Koer*, 6 C. W. N. 345; *Nishi Kanta v. Ashu Tosh*, 17 C. W. N. 613; *Birj Nath v. Chandar Mohan*, 19 All. 458; *Chintaman v. Ramchandra*, 34 Bom. 589; *Hormusji v. Bai Dhunbaiji*, 12 Bom. 164.

(d) Once probate is granted no suit will lie for a declaration that the will is not genuine, *Sheoparsin v. Ramnandan*, 20 C. W. N. 738 (P. C.); or that the testator was not of sound mind, *Allen v. Dundas*, 3 T. R. 125; *Allen v. McPherson*, 1 H. L. C. 191.

The grant of probate is not conclusive against all the world in regard to the following:—

(a) In *Kalyanchand v. Sitabai*, 16 Bom. L. R. 5 (F. B.), it was held that sec. 41 of the Evidence Act was not applicable to the judgment of probate Court which declared that the will was made when the testator was not of sound mind.

(b) It may be shown that the grant was revoked or that it was forged or that it was granted by a Court that had no jurisdiction.

(c) If the grant is refused by a competent Probate Court the refusal does not necessarily amount that the will is not genuine, *Ganesb v. Ramchandra*, 21 Bom. 563.

(d) The grant does not decide any question of title or of the disposing power of the testator, for in an application for probate it is not the province of the Probate Court to go into the question of title of the property or the validity of the disposition, *Bal Gangadhar Tilak v. Sakwarbai*, 26 Bom. 792, *Ochavaran v. Dolatram*, 28 Bom. 644; *Arunmoyi v. Mohendra*, 20 Cal. 888; *Jagannath v. Runjit*, 25 Cal. 354. *Chinnasami v. Hariharabadra*, 16 Mad. 380; *Chintaman v. Ramchandra*, 34 Bom. 589; *Barot Parshotam v. Bai Afuli*, 18 Bom. 749; *Raghu Nath v. Musst. Pate Koer*, 6 C. W. N. 345.

In *Mirza Kurratulain v Nawab Nuzhat-ud-Dowla*, 9 C. W. N. 938 (P. C.), their Lordships held that the plea of *res judicata* taken on the ground that the questions in issue in the suit were formerly in issue in probate proceedings could not be given effect to when the said proceedings are not in evidence and there is no sufficient evidence to support the plea. The Court cannot give effect to the plea unless it can say for itself that the matter in issue in the suit were in issue in the probate proceedings. In *Lalit Mohan v. Radharam*, 15 C. W. N. 1021, an application was made by A for letters of administration alleging that he was the nephew of the deceased; a caveat was entered by B. and it was proved in the probate proceedings that A was not the nephew of the deceased and the application was refused. A then filed a suit against B for a declaration of title to the property of the deceased on the same ground that he was the nephew of the deceased. It was held that the decision of the Probate Court on the relationship of the plaintiff was not *res judicata*. See also, *Sheoparasan v. Ramnandas*, 20 C. W. N. 738.

(e) Probate when granted affords *prima facie*, though not conclusive, evidence of the domicile of the testator, *Eames v. Hacon*, 18 C. D. 347; *Bradford v. Young*, 26 C. D. 656; *Concha v. Concha*, 11 App. Cas. 541.

So long as letters of administration remain in force they are conclusive evidence that the administrator to whom as next-of-kin, or one of the next-of-kin they were granted, is in fact such next-of-kin; *Re Ivory*, 10 C. D. 372.

As to the effect of probate over the property of the testator see sec. 273.

228. When a will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the Province, whether within or beyond the limits of His Majesty's dominions, and a properly authenticated copy of the will is produced, letters of administration may be granted with a copy of such copy annexed.

Administration with copy annexed of authenticated copy of will proved abroad.

(This is sec. 180 of the Succession Act X of 1865 with the following alteration, viz., the words "whether in the British dominions or in a foreign country" are changed into "whether within or beyond the limits of His Majesty's dominions." Corresponding sec. of the Probate and Administration Act V of 1881 is sec. 5).

COMMENTARY.

Of the Probate of the Wills of Foreigners and of the British Subjects not domiciled in British India.—The executor of a person who has died domiciled in a foreign country is not by virtue of a foreign probate entitled to sue in the Courts of British India, nor can the executor of a person who has died

domiciled in India, sue in a foreign Court by virtue of the probate granted by the Courts in British India. This section enacts that when a will has been proved in a Court of competent jurisdiction beyond the limits of British India, whether in the British dominions or in a foreign country, and a properly authenticated copy of the will is produced, *letters of administration* may be granted *with a copy of such copy annexed*. This section comes into operation only when the deceased had died in a country beyond British India, leaving a will and also leaving property both at the place of his domicile and in British India. If the executor of the will to whom probate is granted by a competent foreign Court wishes to administer the property in British India, he must obtain letters of administration with a copy of an authentic copy of the will annexed, and by this way to dispense with the necessity of proof of the original will. But if the foreign will has not been proved, the Court will have to take evidence as to the due execution of the will according to the law of the country in which the testator was domiciled and in case of moveable property the Court must satisfy by evidence as to the law relating to execution of wills in force in such country, *Bhaurao v. Lakshmidasi*, 20 Bom 607 at 610. It is not the function of the Court in British India to require evidence of the validity of the will if it is recognised as valid by the Court of domicile of the testator. (See Mortimer on Probate, p. 25). According to English practice probate may be granted of a will of a person domiciled abroad upon proof that it is a valid will according to the law of the domicile and that there are assets within the jurisdiction. It is not necessary that it should be first proved in the Court of domicile, *Soona Mayna v. Soona Navena*, 20 C. W. N. 833 (P. C.).

The grant of letters of administration under this section will not be made as a matter of course by the Probate Court on the mere production of an authentic copy of the will, but the Probate Court will exercise its own judgment and discretion, *In the goods of Cosnahan*, L. R. 1 P. & D. 183; *In the goods of Weaver*, 36 L. J. P. & M. 41.

If a testator has made two independent wills, one disposing of his property in this country and the other disposing of his property abroad, the former alone should be admitted to probate here, *In the goods of Coode*, 1 P. & D. 449; *In the goods of Astor*, (1876) 1 P. D. 150; *In the goods of Murray*, (1896) P. 65.

If a foreigner dies in British India leaving a will disposing of his property in the country of his domicile alone, the will need not be proved here, and probate thereof cannot be granted by the Courts in British India.

Exemplification.—The “properly authenticated copy of the will” referred to under this section is called exemplification. For form of exemplification see Cooté's Probate Practice. This section speaks only of letters of administration but probate may also be granted, *In the goods of Primrose*, 16 Cal. 776. Probate will be granted on two grounds:—*first* that the will has been adopted as a valid testament by the Court of the country of domicile and *secondly* on proof that the will is valid by the law of the country in which the testator was domiciled at the time of his death. (Mortimer on Probate, p. 485).

Evidence.—The law of the country will be proved by an expert in that law. The certificate of an ambassador of the country in question is sufficient.

The Colonial Probates Act, (1892) 55 Vict. c. 6, and the practice therein indicated, viz., to send an exemplification of the probate granted in any part of the United Kingdom to be resealed by the Court to which it is sent has not been extended to British India. Here the practice is to require letters of administration with the will annexed to the estate of a British subject leaving property in India, *In the goods of William Rennie*, 40 Cal. 74.

Procedure.—For procedure see *Bhaurao v. Lakshmbai*, 20 Bom. 607. The application should be made by a duly constituted attorney in India under a power of attorney executed in accordance with sec. 85 of the Evidence Act, *In the goods of Primrose*, 16 Cal. 776. For the meaning of the word "deposited" under this section see *Sushilabala v. Anukul*, 22 C. W. N. 713.

229. When a person appointed an executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to accept or renounce his executorship:

Grant of administration where executor has not renounced.

Provided that, when one or more of several executors have proved a will, the Court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved.

(This is sec. 193 of the Succession Act X of 1885 and sec. 16 of the Probate and Administration Act V of 1881).

COMMENTARY.

Of Acceptance and Renunciation of the Office of Executor.—An executor cannot be compelled to accept executorship. He may refuse to act as executor. He may renounce his right, *Dayabhai v. Damodar*, 20 Bom. 227, 21 Bom. 75. When a person who has been appointed executor has not renounced, he may be called upon to accept or refuse executorship and a citation will be issued to him by the Court of Probate. The time allowed to the executor to deliberate whether he will accept or refuse the executorship is uncertain, and left to the discretion of the judge, *Kavasji v. Bai Dinbai*, 40 Bom. 666. But, if the executor once elects to administer or intermeddles with the estate of the testator, he will be compelled to prove the will although a next-of-kin who may have intermeddled with the estate of the deceased cannot be compelled to take out letters of administration, *Ackerley v. Oldhan*, 1 Phillim. 248.

With respect to what acts will amount to an administering such as to compel the executor to take probate the following two rules have been laid down in Williams on Executors, 10th Edn., at p. 200: 1st, that whatever the executor does with relation to the goods and effects of the testator, which shows an intention in him to take upon him the executorship will regularly amount to an administration. 2ndly, that whatever acts will make a man liable as an executor *de son tort* will be deemed an election of the executorship. Taking possession of the estate of the testator, or selling the same, or receiving debts due to the testator will amount to administration, *Long v. Symes*, 3 Hagg. 774. An executor who has once accepted

executorship or taken probate cannot afterwards renounce, *Ayshabai v. Ebrahim*, 32 Bom. 364.

What is citation.—When a person having the superior right to prove a will or take administration delays or declines to do so, the Court, at the instance of a person having an inferior right, cites the person having the superior right to take the required grant and on his failing to do so decrees it to the other.

It is a summons calling upon a party to do something or to see something. Citations are issued for the following four purposes: (a) to produce will (sec. 267), (b) to see proceedings, (c) to bring in probate when improperly granted and (d) to bring in letters of administration when improperly granted. Under this Act there are two kinds of citation: (a) compulsory or special citation and (b) discretionary or general citation. Citation under this section is compulsory or special, *Sarojini v. Rajlakshmi*, 47 Cal. 838. Sec. 235 is another instance of compulsory citation. An executor called upon by citation to accept or renounce is compellable if he accepts to take out probate within a limited time. If he does not, letters of administration with the will annexed may be granted to any competent applicant, *Motibai v. Karsandas*, 19 Bom. 123; *Kavasji v. Bai Dinbai*, 40 Bom. 666, *Sarojini v. Rajlakshmi*, 47 Cal. 838. A case of a discretionary citation is to be found in sec. 283 which says that it shall be lawful for the Judge, if he thinks fit, to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.

As to the effect of omission to issue citation (see p. 265 *ante*).

230. The renunciation may be made orally in the presence of the Judge or by a writing signed by the person renouncing, and when made shall preclude him from ever thereafter applying for probate of the will appointing him executor.

Form and effect of renunciation of executorship.

(This is sec. 121 of the Succession Act X of 1865 and sec. 17 of the Probate and Administration Act V of 1891)

COMMENTARY.

Renunciation is the act whereby a person having a superior interest or right to probate or administration waives and abandons it. **What is renunciation.** An executor who has not elected to administer may renounce executorship. When the executor has renounced executorship, letters of administration with the will annexed may be granted to the person entitled thereto. When the executor has not renounced executorship, letters of administration shall not be granted to any other person until a *citation* has been issued calling upon the executor to accept or renounce his executorship.

How Renunciation may be made.—Renunciation may be made in two ways.

- (1) Orally in the presence of the Judge, or
- (2) By a writing signed by the person renouncing.

tion with the will annexed to a competent applicant, *Motibai v. Karsondas*, 19 Bom. 123; *Kavasji v. Bai Dinbai*, 40 Bom. 666.

Form of Citation.—Whereas it appears by the petition of A. B. of.....filed in this Court on the.....day of.....that C. D. late of.....deceased died on the.....day of.....having made and duly executed his last will bearing date.....and therein appointed you sole executor and whereas it further appears by the said petition that the said A. B. is a legatee named therein.

You are hereby summoned to appear in this Court in person or by pleader within.....days from the date of service hereof on you, and accept or refuse the probate and execution of the said will or show cause why the same should not be granted to the said A. B. And take notice that in default of your appearing this Court will proceed to grant administration of the estate of the said deceased to the said A. B. in your absence.

Grant of administration to universal or residuary legatees

232. When—

- (a) the deceased has made a will, but has not appointed an executor, or
- (b) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the will, or
- (c) the executor dies after having proved the will, but before he has administered all the estate of the deceased,

an universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.

(This is sec. 196 of the Succession Act X of 1865 and sec. 10 of the Probate and Administration Act V of 1881).

COMMENTARY,

(See sec. 235).

- 233.** When a residuary legatee who has a beneficial interest survives the testator, but dies before the estate has been fully administered, his representative has the same right to administration with the will annexed as such residuary legatee.

Right to administration of representative of deceased residuary legatee

(This is sec. 197 of the Succession Act X of 1865 and sec. 20 of the Probate and Administration Act V of 1881).

COMMENTARY.

(See sec. 235).

234. When there is no executor and no residuary legatee

Grant of administration where no executor, nor residuary legatee nor representative of such legatee.

or representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.

(This is sec. 198 of the Succession Act X of 1865 and sec. 21 of the Probate and Administration Act V of 1881)

COMMENTARY.

(See sec. 235).

235. Letters of administration with the will annexed shall

Citation before grant of administration to legatee other than universal or residuary

not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on the next-of-kin to accept or refuse letters of administration.

(This is sec. 199 of the Succession Act X of 1865 and sec. 22 of the Probate and Administration Act V of 1881)

COMMENTARY.

Letters of administration "*cum testamento annexo*" (i. e., with the will annexed).—Letters of administration with the will annexed may be granted under the following circumstances.

- (1) If no executor has been appointed.
- (2) If the executor appointed has died in the testator's lifetime or after his death without proving.
- (3) If the executor has died after having proved the will, but before he has administered all the estate of the deceased.
- (4) If the executor has renounced or been cited and has not appeared.
- (5) If the executor is legally incapable or refuses to act.
- (6) If the executor is residing out of the province (sec. 254).

To whom Letters of Administration "*cum testamento annexo*" may be granted.—The general rule is that they should be granted to the person who has the greatest interest in the estate of the testator. Subject to this, the following persons have a preferential right to letters of administration *cum testamento annexo* in the order of enumeration. An executor cannot be allowed to take out letters of administration *cum testamento annexo*, for a person entitled to a grant in a superior character cannot take it in an inferior character.

(1) The universal or residuary legatee. The residuary legatee is passed over if he has no interest, *e. g.*, where he has assigned over his interest, *Mayhew v. Newstead*, 1 Curt. 593. If there are several residuary legatees, administration may be granted to any of them, *Taylor v. Shore*, T. Jones, 162. A residuary legatee is not entitled to probate, *Pundit v. Goukaran*, 6 C. W. N. 787; *In re Shoshee Bhusan Bannerjee*, 19 Cal. 582.

(2) The legal representatives of the universal or residuary legatee when the residuary legatee has a beneficial interest. The representative, however, of a residuary legatee for life has no interest. Thus, where a testator appointed his wife residuary legatee for life and after her death appointed his daughter substituted residuary legatee, it was held that the husband of the daughter was entitled to administration in preference to the representative of the mother, *Weldrill v. Wright*, 2 Phillim. 248. The heir of the universal legatee may be granted letters *cum testes* in the absence of legal representative, *Haribhusan v. Manmatha*, 45 Cal. 862. An idol may be a residuary legatee and the shebait may be granted letters of administration with will annexed, *Kali Krishna v. Makhan Lal*, 50 Cal. 233; *Ranjit Singh v. Jagannath*, 12 Cal. 375.

(3) The next-of-kin of the deceased. The next-of-kin is passed over when he has no interest.

(4) Any other legatee having a beneficial interest.

(5) A creditor of the deceased.

Sec. 234 is discretionary. Ordinarily the creditor comes in after the next-of-kin. But if the interest of the estate requires it, a grant may be made to a creditor in preference to a pecuniary legatee, *In re N. C. Viegas*, 1 B. H. C. R. 103.

NOTE.—Under sec 8 of the Administrator-General's Act No III of 1913, the Administrator-General has a right to letters of administration other than letters *pendente lite* in preference to that of (a) a creditor, or (b) a legatee other than an universal legatee; or (c) a friend of the deceased.

Citation.—Citation required under sec. 235 is compulsory or special. In all these cases where a party has a prior title to a grant, a citation must be issued to him before granting letters of administration to any other person. Therefore, the executor, if there be one, must be cited before a grant to a residuary legatee, unless the executor has renounced executorship. A residuary legatee must be cited before a grant to the next-of-kin, and the next-of-kin must be cited before a grant to a legatee other than an universal or residuary legatee, and so on through all the gradations of priority.

In every case in which probate of the will of a Hindu is applied for a special citation must be served on those persons whose interests are directly affected by the will, *In the matter of the Petition of Hurro Lal Shaha*, 8 Cal. 570.

Effect of Omission to issue Citation.—Where the compulsory citation is omitted, the grant of letters of administration with the will annexed would be defective on the face of it, because the will is the act of the deceased himself and provides for the persons who should administer the estate; in such a case the

being defective should be revoked as soon as the defect comes to the notice of the Court, *Elokeshi v. Hari Prasad*, 30 Cal. 528; *In the goods of Gunga Bisnen*, 2 C. W. N. 607; *Sarajini v. Rajlakshmi*, 47 Cal. 838. But if the person entitled to a special citation is otherwise aware of the application and had an opportunity of intervening, refrains from doing so the omission to serve citation will not affect the grant, *Kanhai Rout v. Jagendra*, 1 Pat. 86. Where, however, citation is discretionary and a person who may be interested in disputing the genuineness of the will is not cited and probate is granted *ex-parte*, the mere absence of citation does not invalidate the grant because the will may be a perfectly genuine will and the opposition of persons who ought to have been cited might have proved ineffective, *Digambar v. Narayan*, 13 Bom. L. R. 38.

A citation answers two purposes ; it either compels a representation to be taken by those who are primarily entitled to it, or where they do not take it the process provides a substitute for a voluntary renunciation on their part. (Coote's Probate Practice, 12th Edn., p. 242).

Where citation is discretionary the practice of the Bombay High Court is not to issue citation as a rule in the case of persons governed by the Succession Act. But if the deceased is a Hindu or a Mahomedan citations are as a rule issued. (See High Court Rules, 576-577).

Mere citing a person in probate proceedings does not make him a defendant, unless the caveat is filed, *Saroja Sundari v. Abhoy Charan*, 41 Cal. 819.

Service of Citation.—Ordinarily citation is to be served personally through the bailiff of the Court and in case of special citation it must be served personally. In case of discretionary citation it is usually inserted in local papers inviting all persons interested in the estate to come and see the proceedings. If the person required to be served is a minor the practice is to appoint a guardian *ad litem* for the minor and to serve the citation on him, *Radhashyam v. Ranga Sundari*, 24 C. W. N. 541; *Sachindra v. Hironmoyee*, 24 C. W. N. 538; *Dwijendra Nath v. Goloke Nath*, 19 C. W. N. 747; *Walter Rebells v. Maria Rebells*, 2 C. W. N. 100.

236. Letters of administration cannot be granted to any person who is a minor or is of unsound mind, nor, unless the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, to a married woman without the previous consent of her husband.

(This is sec. 180 of the Succession Act X of 1865 and sec. 19 of the Probate and Administration Act V of 1881).

COMMENTARY.

For commentary see sec. 223. In the matter of William Robert Sheldon deceased consent of the husband was dispensed with by the Bombay High Court in a petition for letters of administration by a married woman. Petition was filed on 28th April 1919. Letters of administration cannot be granted to a minor under the Probate and Administration Act, *In the goods of Seinarain Mohata*, 21 Cal. 911.

CHAPTER II.

Of Limited Grants.

Under this Chapter limited grants are of:—

- I. Grant Limited in Duration—Secs. 237 to 240.
- II. Grant for the Use and Benefit of others—Secs. 241-247.
- III. Grant for Special Purposes—Secs. 248 to 254.
- IV. Grant with Exception—Secs. 255 to 256.
- V. Grant *caeterorum* or Grant of the Rest—Sec. 257.
- VI. Grant *de Bonis Non*—Secs. 258 to 259.
- VII. *Cessate* Grants or Supplemental Grants—Sec. 260.

Grants limited in duration.

237. When a will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is produced.

Probate of copy or draft of lost will.

(This is sec. 209 of the Succession Act X of 1865 and sec. 24 of the Probate and Administration Act V of 1881).

COMMENTARY.

(See next sec.)

238. When a will has been lost or destroyed and no copy has been made nor the draft preserved, probate may be granted of its contents if they can be established by evidence.

Probate of contents of lost or destroyed will.

(This is sec. 309 of the Succession Act X of 1865 and sec. 23 of the Probate and Administration Act V of 1881).

COMMENTARY.

The words "since the testator's death" in sec. 237 qualify only the word "mislaid" and has no reference to the word "lost", *Sarat Chandra v. Golap Sundari*, 18 C. W. N. 527.

I.—GRANTS LIMITED IN DURATION.

When the original will is lost or mislaid since the testator's death, or destroyed by wrong or accident but not by the testator himself, and a copy or draft has been preserved, probate may be granted of such copy or draft, limited until the original or an authentic copy is produced, *In the goods of L. P. D. Broughton*, 29 Cal. 311. But the executor must produce proof by affidavit that the original was duly executed, that it was in existence after the testator's death and has been since lost and that the copy produced is a true one.

Probate may be granted of a lost will if the will is proved by the evidence of witnesses and the evidence of a single witness would be sufficient if his veracity and competency is unimpeached, *Sugden v. Lord St. Leonards*, (1876) 1 P. D. 154; *Harris v. Knight*, 15 P. D. 170.

If no copy or draft has been preserved, probate may be granted of its contents or of its substance and effects, if they can be established by evidence. Oral evidence will be admissible to prove such contents and even post testamentary declarations of the testator as to the contents of the will will be admitted as secondary evidence of the contents, *Sugden v. Lord St. Leonards*, (1876) 1 P. D. 154; *Woodward v. Gouldstone*, 11 App. Cas. 469. (Williams on Executors, 10th Edn., pp. 293-295). Probate can be granted of a portion only of the will to the extent to which the contents are proved when other portion is lost, *Kadar Nath v. Sarojini*, 26 Cal. 634.

In *Ishur Chunder v. Doyamoye*, 8 Cal. 864; *Anwar Hoosein v. Secretary of State*, 31 Cal. 885; *Thornton v. Thornton*, 3 C. W. N. clxix grants were made of lost will. In the case of *Re Haji Mahomed*, 24 Bom. 8 probate was granted of a nuncupative will.

Procedure.—The procedure is to annex a true copy of the will to the petition and the Court will determine whether there was a will of the testator in existence at his death, the circumstances as to its not forthcoming and whether the copy annexed is the true copy thereof, *Ishur Chunder v. Doyamoye*, 8 Cal. 864.

Evidence.—The executor must prove the due execution of the original will that it was in existence at the testator's death and has been lost and that the copy is a true copy.

The contents of a lost will may be proved by secondary evidence and the evidence of a single witness would be sufficient if his veracity and competency is unimpeached, *Sugden v. Lord St. Leonards*, (1876) 1 P. D. 154. Also declarations written or verbal made by the testator both before and after the execution of the will, will be admissible in evidence, *Atkinson v. Morris*, (1897) P. 40. (See Coote's Probate Practice, 15th Edn., p. 426)

239. When the will is in the possession of a person residing out of the province in which application for probate is made, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary for the interests of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the will or an authenticated copy of it is produced.

(This is sec. 210 of the Succession Act X of 1865 and sec. 25 of the Probate and Administration Act I* of 1881).

COMMENTARY.

Where the will or codicil or both are in the custody of a person residing abroad and it is essential that the grant should be made forthwith, a limited grant

will be made of a true copy until the original is forthcoming. But if the person in whose possession the will is, resides within the province, he may be compelled to produce the will either by citation if he is an executor or by a summons. Even a solicitor has no lien on the original will executed by his client and he cannot refuse the production of it, *Georges v Georges*, 18 Ves. 294. It is only where the person resides *outside the province* and the interests of the estate so require that the limited probate under this section may be granted.

Procedure—The executor should make an affidavit showing the manner in which the copy was transmitted to him that a better or more authentic copy does not exist in this country and that it is essential for the interest of the estate that the probate be forthwith granted. See *In re Nobodoorga*, 7 C. L. R. 387.

240. Where no will of the deceased is forthcoming, but there is reason to believe that there is a will in existence, letters of administration may be granted, limited until the will or an authenticated copy of it is produced.

Administration until will produced

(This is sec. 211 of the Succession Act X of 1865 and sec. 27 of the Probate and Administration Act V of 1881.)

COMMENTARY.

A person who applies for letters of administration is required to swear that the deceased died intestate. It sometimes happens that the party cannot in conscience take the oath, for he may know or have reason to believe from the deceased's observations or from the information of others that there was a will in existence subsequently to the deceased's death. If no copy of the will can be produced and its contents cannot be substantiated he may take administration limited until the original or an authentic copy is produced, *In the goods of Metcalfe*, 1 Add. 343.

Grants for the use and benefit of others having right.

241. When any executor is absent from the province in which application is made, and there is no executor within the province willing to act, letters of administration, with the will annexed, may be granted to the attorney or agent of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.

Administration, with will annexed, to attorney of absent executor.

(This is sec. 212 of the Succession Act X of 1865 and sec. 28 of the Probate and Administration Act V of 1881.)

COMMENTARY.

II—GRANT FOR THE USE AND BENEFIT OF OTHERS.

(a) **Administration "durante absentia".**—(1) Where the executor is absent, from the province, letters of administration with the will annexed may be granted to his duly constituted attorney for the use and benefit of his principal limited until he obtains probate or letters of administration. It is only when the executor is absent from the province that letters of administration under this section can be granted to an attorney. If the executor is residing within the jurisdiction

the Court will not grant administration to his attorney for his use and benefit, *In the goods of Burch*, 2 Sw. & Tr. 139. Under this section the attorney must be residing within the province, *In re Nesbitt*, 4 B. L. R. app. 49; *In the goods of Leckie*, 15 B. L. R. App. 8.

The appointment may be under a power of attorney from the executor for his use and benefit. The power of attorney is revocable and when the executor revokes it and desires probate, the Court is bound to grant it to him. The power may be general or special. But the power must be duly executed and attested. (See secs. 82 & 85 of the Evidence Act and the Powers of Attorney Act VII of 1882). The power of attorney shall be annexed to the petition and evidence shall be given of its due execution. A power of attorney executed before a notary public would be sufficient if the notary has made the usual declaration on the power, *Goods of Mylne*, 33 Cal. 625; *Goods of Henderson*, 22 Cal. 491; *In re Sladen*, 21 Mad. 492; *Goods of William Rennie*, 40 Cal. 74.

On the return of the executor to the province and applying for probate, the grant *durante absentia* ceases and expires and there is no necessity to expressly revoke such grant, *In the goods of Cassidy*, 4 Hagg. 360. Also, on the death of the absent executor, the letters of administration cease to be of any force, and the administrator cannot make a good title if he sells the property of the deceased, unless he can warrant to the purchaser that the executor is alive, *Webb v. Kirby*, 7 De G. M. & G. 381.

But so long as the grant is subsisting an administrator under this section is the legal representative of the deceased and has all the powers of an ordinary administrator.

When once probate is granted to an executor and the executor goes abroad no letters of administration to his attorney can be granted under this section, but under sec. 252 letters of administration for the purpose of becoming a party to a suit to be brought against the executor or administrator may be granted. [See post p. 276; see also, *In the estate of Thomas*, (1912) P. 177].

Under rule 580 of the Bombay High Court Rules an application for letters of administration or administration with the will annexed may be made by a constituted attorney of a person residing out of the province provided that such constituted attorney resides within the province and that such application is made through an attorney of the Court.

An administrator under this section is not required to execute administration bond. (See sec. 291).

242. When any person to whom, if present, letters of administration, with the will annexed, might be granted, is absent from the province, letters of administration, with the will annexed, may be granted to his attorney or agent, limited as mentioned in section 241.

Administration, with will annexed, to attorney of absent person who, if present, would be entitled to administer.

(This is sec. 213 of the Succession Act X of 1865 and sec. 29 of the Probate and Administration Act V of 1881)

COMMENTARY.

This section deals with the case of grant to an absent administration when the deceased has left a will. See *In Re Mylne*, 33 Cal. 625.

243. When a person entitled to administration in case of intestacy is absent from the province, and no person equally entitled is willing to act, letters of administration may be granted to the attorney or agent of the absent person, limited as mentioned in section 241.

Administration to attorney of absent person entitled to administer in case of intestacy.

(This is sec. 214 of the Succession Act X of 1865 and sec. 30 of the Probate and Administration Act V of 1881)

COMMENTARY.

This section deals with the case of grant to an absent administrator in case of intestacy.

244. When a minor is sole executor or sole residuary legatee, letters of administration, with the will annexed, may be granted to the legal guardian of such minor or to such other person as the Court may think fit until the minor has attained his majority at which period, and not before, probate of the will shall be granted to him.

Administration during minority of sole executor or residuary legatee

(This is sec. 215 of the Succession Act X of 1865 and sec. 31 of the Probate and Administration Act V of 1881).

COMMENTARY.

(See next section).

245. When there are two or more minor executors and no executor who has attained majority, or two or more residuary legatees and no residuary legatee who has attained majority, the grant shall be limited until one of them shall have attained his majority.

Administration during minority of several executors or residuary legatees.

(This is sec. 216 of the Succession Act X of 1865 and sec. 32 of the Probate and Administration Act V of 1881).

COMMENTARY.

Administration "*durante minore etate*".—Where a minor is sole executor or sole residuary legatee, letters of administration with the will annexed may be granted to the legal guardian or to some fit person limited until the minor shall have completed his eighteenth year at which period and not before probate may be granted to him. Letters of administration under this section can only be granted to the legal guardian of the minor and not to any other person. A testame

guardian appointed by the father under sec. 60 is a legal guardian. A husband is not a legal guardian of his minor wife. Hence, where a husband applies for letters of administration under this section for the benefit of his minor wife, he must first apply to be appointed guardian of his wife, *In the goods of Nirojini Debi*, 34 Cal. 706.

When there are two or more minor executors or residuary legatees and no one has attained majority, the grant *may be limited until one of them* completes the age of eighteen years, *Madhavrao v. Maneklal*, 2 Bom. L. R. 797.

It is only in case of a minor executor or a residuary legatee that the grant may be so limited. If the person entitled to letters of administration in case of intestacy is a minor, no letters of administration to his guardian limited as above can be granted, but the person next in right would be entitled to letters of administration. A Succession Certificate was granted to a minor under the Succession Certificate Act. See *Krishnama v. Venkammah*, 36 Mad. 214. There was no provision made in the Succession Act X of 1865 as in the Probate and Administration Act, sec. 33, for grant of letters of administration if the person solely entitled to administer is a minor. This defect is now remedied and the word "minor" is added to sec. 246. Limited administration under these sections can be granted only where *all* the executors or residuary legatees are minors. If one of them is of full age, no administration of this kind ought to be granted, because he who is of full age may prove the will, *Pigot & Gascoigne's Case*, (1572) Brownl. 46. See *contra*, *Cartwright's Case*, 1 Freem. 258.

An administrator *durante minore ætate* has all the powers of an ordinary administrator *while* the minority lasts; the only limitation is the minority of the person, there is no other limit, *Re Cope*, 16 C. D. 49. He is an ordinary administrator, he can pay debts, sell the estate, pay legacies, and do all other acts in due course of administration. "Whether in the event of his selling otherwise than in due course of administration, a purchaser from him in good faith would acquire a good title or whether a purchaser is bound to satisfy himself that the sale is for due purpose of administration appears never to have been expressly decided." (Williams on Executors, 10th Edn., p. 394). But it is submitted that an administrator *durante minore ætate* is during the minority in all respects on the same footing as an ordinary general administrator, *Re Cope*, 16 C. D. 49. (Williams on Executors, 10th Edn. pp. 386-397).

Consequence of the death of the guardian. If the guardian dies before majority is attained by any one of the minors, the administration granted to him ceases, and fresh letters of administration must be taken by a new guardian.

Consequence of the death of minors. If the sole minor, or all the minors (where there are several) die before attaining majority, the grant made to the guardian ceases, and if a part of the estate remains unadministered, letters of administration *de bonis non* must be obtained. (Coote's Probate Practice, 12th Edn., p. 183).

246. If a sole executor or a sole universal or residuary legatee, or a person who would be solely entitled to the estate of the intestate according to the rule for the distribution of intestates' estates applicable in the case of the deceased, is a minor or lunatic, letters of administration, with or without the will annexed, as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent authority, or, if there is no such person, to such other person as the Court may think fit to appoint, for the use and benefit of the minor or lunatic until he attains majority or becomes of sound mind, as the case may be.

(This is sec. 217 of the Succession Act X of 1865 and sec. 33 of the Probate and Administration Act V of 1881).

COMMENTARY.

Under sec. 217 of the Succession Act X of 1865 there was no provision made for grant of administration in the case of an intestate in case the person solely entitled to administration was a minor as under sec. 33 of the Probate and Administration Act V of 1881. This defect is now remedied, *Madhavrao v Maneklal*, 2 Bom. L. R. 797.

Administration for the use and benefit of a lunatic.—If a sole executor or a sole universal or residuary legatee, or a person solely entitled to administration in case of intestacy is a lunatic, letters of administration with or without the will annexed as the case may be, may be granted to his committee, or if there be no committee to any other fit person for the use and benefit of the lunatic limited, until he shall become of sound mind.

Under this section it is not necessary that the executor or the residuary legatee, etc., should have been adjudged lunatic by the Court. When the executor, etc., has not been adjudged lunatic, the Court requires affidavits stating the fact of lunacy, and that no inquisition has been had, and, of course, no committee appointed.

Where probate or letters of administration has or have been granted to a single executor or administrator and the executor or administrator subsequently becomes a lunatic, the practice in England is not to revoke the probate or letters of administration already granted, but to grant administration with or without the will annexed limited during the lunacy of the executor or administrator, *In the goods of Binckes*, 1 Curt. 286. (Williams on Executors, 10th Edn., pp. 410-412).

According to this Act it would seem that the probate or letters of administration already granted would have to be revoked and a new grant made to the committee of the lunatic, or if there be no committee to any fit person limited as above. (See ill. viii., sec. 263).

When administration has been granted under this section for the use and benefit of a lunatic, the grant ceases on the latter becoming sane, and he may take probate of the will or letters of administration as the case may be.

But if the administrator die before the recovery of the lunatic further administration is granted to some other person for the use and benefit of the lunatic.

If the lunatic die, the grant made for his use and benefit ceases and administration (with or without the will annexed) *de bonis non* is granted to some other person having interest. (Coote's Probate Practice, 12th Edn., pp. 181-182).

247. Pending any suit touching the validity of the will of a deceased person or for obtaining or revoking any probate or any grant of letters of administration, the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the Court and shall act under its direction. •

(This is sec. 218 of the Succession Act X of 1865 and sec. 31 of the Probate and Administration Act V of 1881.)

COMMENTARY.

Administration "*pendente lite*".—An administrator *pendente lite* is appointed by the Court pending contested testamentary and administration suits. The Court may appoint an administrator *pendente lite* when there is a suit—

- (1) Touching the validity of the will of the deceased, or
- (2) For obtaining or revoking any probate, or
- (3) For obtaining or revoking any grant of letters of administration.

The Court has power to appoint an administrator *pendente lite* on the application of a person who is not a party to the suit, *Tichborne v. Tichborne*, L. R. 1 P. & M. 730. The Court may even grant injunction in a proper case, *Nirod Barani v. Chamat Karini*, 19 C. W. N. 205. Before appointing an administrator *pendente lite* the Court must be satisfied as to the necessity of such appointment and also as to the fitness of the proposed administrator. If the application is for grant of letters of administration for the use and benefit of the minor, the Court must be satisfied as to the proper custody of the property of the minor pending the progress of proceedings, *Madhavrao v. Maneklal*, 2 Bom. L. R. 797. The Court will appoint an administrator *pendente lite* if it is just and proper to do so, *Jogendra v. Atindra*, 13 C. L. J. 34; *Bhuban Mohini v. Kiran*, 13 C. L. J. 47; *Brindaban v. Sureswar*, 10 C. L. J. 263, although a receiver may have been appointed by the Court in a suit pending between the same parties and affecting the same property as the testamentary or administration suit, *Tichborne v. Tichborne*, L. R. 1 P. & M. 730. An administrator *pendente lite* must be an indifferent person between the contending parties and not a nominee or agent of any of them.

An administrator *pendente lite* has all the rights and powers of a general administrator *except the right of distributing the estate*. He renders himself liable if he intermeddles with the estate after his functions cease, *In the goods of Gopal Lal Seal*, 7 C. W. N. cciv.; *Khitish Chandra v. Radhika*, 35 Cal. 276; *Madhavrao v. Maneklal*, 2 Bom. L. R. 797. An administrator *pendente lite* discharges his duty

to account when his accounts are complete and does not contain false or fraudulent entries or omissions, *Khitish Chandra v. Osmond*, 39 Cal. 587. He is, however, subject to the immediate control of the Court, and must act under its direction. He has power to receive and recover debts and file suits for the purpose, *Walker v. Woollaston* 2 P. Wms. 589. He can be sued without any leave from the Court, *In re Toleman*, (1897) 1 Ch. 866.

The functions of an administrator *pendente lite* commence from the order of appointment and, if the decree in the suit is appealed from, do not cease until the appeal has been disposed of, *Taylor v. Taylor*, 6 P. D. 29. If there is no appeal his functions terminate with a decree pronounced in favour of a will and do not continue until the executors obtain probate, and the case is not altered if there are no executors, *Wieland v. Bird*, (1894) P. 262. (Williams on Executors, 10th Edn., pp. 398-403).

Grants for special purposes.

248. If an executor is appointed for any limited purpose specified in the will, the probate shall be limited to that purpose, and if he should appoint an attorney or agent to take administration on his behalf, the letters of administration, with the will annexed, shall be limited accordingly.

Probate limited to purpose specified in will.

(This is sec. 219 of the Succession Act X of 1865 and sec. 35 of the Probate and Administration Act V of 1881).

COMMENTARY.

III—ADMINISTRATION LIMITED FOR SPECIAL PURPOSES.

Probate for special purpose.—If an executor is appointed for any limited purpose, *e. g.*, for the purpose of administering the estate of another testator whose sole or surviving executor the deceased was, the probate shall be limited to that purpose.

If a testator appoint an executor of his will generally and another for particular purposes and the general and limited executors both apply for probate at the same time, the grant is made in the same instrument, but the powers of each are distinguished, that is to say, probate is therein granted of all the estate of the deceased to the general executor, and of that part thereof to the limited executor to which his executorship is expressly confined. If the general executor apply before the limited executor, the former takes a general probate, and a power is reserved of granting probate under limitations to the limited executor. Probate cannot be granted of a portion of the estate. (Coote's Probate Practice, 12th Edn., p. 150).

249. If an executor appointed generally gives an authority to an attorney or agent to prove a will on his behalf, and the authority is limited to a particular purpose, the letters of administration, with the will annexed, shall be limited accordingly.

Administration, with will annexed, limited to particular purpose.

(This is sec. 220 of the Succession Act X of 1865 and sec. 36 of the Probate and Administration Act V of 1881 with the addition of the words "or agent").

250. Where a person dies, leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the beneficiary, or to some other person on his behalf.

(This is sec. 221 of the Succession Act X of 1865 and sec. 37 of the Probate and Administration Act V of 1881).

COMMENTARY.

Persons entitled to grant under this section are—

- (a) A new trustee duly appointed or his nominee.
- (b) The beneficiary, an idol is a beneficiary, *Ranjit Singh v. Jagannath*, 12 Cal. 375.
- (c) Some person on behalf of the beneficiary.

A person obtaining a limited grant under this section does not by virtue of it acquire nor has he power rightfully to dispose of any interest outside the limits of the grant, *De Silva v. De Silva*, 5 Bom. L. R. 784.

251. When it is necessary that the representative of a person deceased be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the said cause or suit, and until a final decree shall be made therein and carried into complete execution.

(This is sec. 222 of the Succession Act X of 1865 and sec. 38 of the Probate and Administration Act V of 1881).

COMMENTARY.

See *Dowdeswell v. Dowdeswell*, L. R. 9 Ch. D. 294; *Fardunji v. Navajbai*, 17 Bom. 689.

An administrator under this section has only authority to carry on the suit; he has no authority to receive the fruits of it, *In the goods of Dodgson*, 1 Sw. & Tr. 259.

252. If, at the expiration of twelve months from the date of any probate or letters of administration, the executor or administrator to whom the same has been granted is absent from the province within which the Court which has granted the probate or letters of administration exercises jurisdiction, the Court

Administration limited to purpose of becoming party to suit to be brought against administrator.

may grant, to any person whom it may think fit, letters of administration limited to the purpose of becoming and being made a party to a suit to be brought against the executor or administrator, and carrying the decree which may be made therein into effect.

(This is sec 223 of the Succession Act X of 1865 and sec. 33 of the Probate and Administration Act V of 1881).

COMMENTARY.

Administration limited for becoming party to suit when the executor or administrator is absent—The authority of an administrator appointed under this section does not terminate on the death of the executor or administrator, the grant being made not for a limited time, but for a limited purpose, viz., for the purpose of becoming a party to a suit and carrying the decree which may be made therein into effect, *Rainsford v Taynton*, 7 Ves. 466.

If the original executor or administrator returns he must be made a party to the suit; the temporary administrator may account, have costs, and be discharged. But payment of a debt to an administrator appointed during the absence of the executor is a good payment even after the return of the executor, provided the debtor who paid the money had no notice of the return, *Walker v. Woollaston*, 2 P. Wms. 589.

253. In any case in which it appears necessary for preserving the property of a deceased person, the Court within whose jurisdiction any of the property is situate may grant to any person, whom such Court may think fit, letters of administration limited to the collection and preservation of the property of the deceased and to the giving of discharges for debts due to his estate, subject to the directions of the Court.

(This is sec 224 of the Succession Act X of 1865 and sec. 40 of the Probate and Administration Act V of 1881).

COMMENTARY.

Letters of Administration "ad colligenda bona".—Letters granted under this section are technically called "*ad colligenda bona*." *Ad colligendum bonum* means for the purpose of gathering up the goods of the deceased. Letters *ad colligendum* will be granted not only to any one whom the Court considers for the occasion eligible, but will also be made to the persons who are entitled to a full grant if the interests of the estate cannot wait or to entire strangers whom mere chance has brought into connection with the affairs. (Coote's Probate Practice, 12th Edn., p. 165)

254. (1) When a person has died intestate, or leaving a will of which there is no executor willing and competent to act or where the executor is, at the time of the death of such person, resident out of the province, and it appears to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof, other than

Appointment, as administrator, of person other than one who, in ordinary circumstances, would be entitled to administration.

the person who, in ordinary circumstances, would be entitled to a grant of administration, the Court may, in its discretion, having regard to consanguinity, amount of interest, the safety of the estate and probability that it will be properly administered, appoint such person as it thinks fit to be administrator.

(2) In every such case letters of administration may be limited or not as the Court thinks fit.

(*This is sec. 225 of the Succession Act X of 1905 and sec. 41 of the Probate and Administration Act V of 1881*)

COMMENTARY.

Appointment as administrator of person other than one who under ordinary circumstances would be entitled to administration.—Wherever it shall appear to the Court to be necessary or convenient, it will appoint some person other than the person who under ordinary circumstances would be entitled to a grant of administration.

Before appointing an administrator under this section the Judge will take the following into consideration: (a) consanguinity, (b) amount of interest, (c) the safety of the estate, and (d) probability that it will be properly administered.

The Court will appoint an administrator under this section in the following cases—

(a) In case of intestacy.

(b) In case of will if there is no executor or if the executor is unwilling or incompetent or is absent.

By this section most extensive powers are given to the Court. Grant under this section is discretionary and will be made if a case for *protection* or *preservation* of the estate is made out, *Goods of Kamineymoney*, 21 Cal. 697; *Annopurna Dasi v. Kallayani Dasi*, 21 Cal. 165; *Hara Coomar v. Doorgamani*, 21 Cal. 195; *Narendra v. Charu Chandra*, 12 C. W. N. 747.

Grants with exception.

255. Whenever the nature of the case requires that an exception be made, probate of a will, or letters of administration with the will annexed, shall be granted subject to such exception.

(*This is sec. 226 of the Succession Act X of 1905 and sec. 42 of the Probate and Administration Act V of 1881*).

COMMENTARY.

(See next section)

256. Whenever the nature of the case requires that an exception be made, letters of administration shall be granted subject to such exception.

(*This is sec. 227 of the Succession Act X of 1905 and sec. 43 of the Probate and Administration Act V of 1881*).

COMMENTARY.

IV—GRANT WITH EXCEPTION.

Probate cannot be granted of a portion of the will or relating to a part of the estate. If the whole estate is vested in the executor he must obtain probate of the entire estate, *Re Thaker Madhavji Dharamsi*, 6 Bom. 460. Similarly letters of administration limited to certain property cannot be granted. If a Hindu takes out administration it must be general, *In the goods of Ramchand Seal*, 5 Cal. 2; *In the goods of Grish Chunder Mitter*, 6 Cal. 483, except only in a special case, see *In the goods of Cowar Suttyn Krishna*, 10 Cal. 554.

Under rule 579 of the Bombay High Court Rules no person entitled to a general grant will be permitted to take out a limited grant except by an order of the Judge.

These two sections are exception to the above rule. The sections are worded in a wide term "whenever the nature of the case requires" but in practice grant with exception is made when a particular clause has been inserted by fraud or by forgery. If the Court is satisfied that a particular clause has been inserted in a will by fraud, without the knowledge of the testator in his lifetime, or by forgery after his death, or if he has been induced by fraud to make it a part of the will, probate will be granted of the instrument with the reservation or omission of that clause, *Rhodes v. Rhodes*, L. R. 7 App. Cas. 192; *In the goods of Oswald*, L. R. 3 P. & D. 162; *In the goods of Boehm*, (1891) P. 247. But the Court cannot even by consent order a passage of the will to be expunged which the testator intended to form part of it nor can the Court make any alterations or insertions in the will of which probate has been granted, *In the goods of Walkeley*, 69 L. T. 419. (Williams on Executors, 10th Edn., pp. 291-292).

But the Court has, it seems, power to direct a passage containing a gross libel to be omitted from the probate copy of the will, though it will not exercise the power merely on the ground that the charge is offensive and untrue, *In the goods of Wartnaby*, 1 Rob. 423; *Marsh v. Marsh*, 1 Sw. & T. 528.

Also, where words are introduced in a will *per incuriam*, i. e., by mistake or accident without any instruction from the testator and the will is executed in ignorance, the will not having been read over to the testator, probate may be granted of the remainder of the document omitting the words so inserted, *In the goods of Oswald*, 3 P. & D. 162; *Re Moore*, (1892) P. 378; *Morrell v. Morrell*, 7 P. D. 68. But the Court will not supply words accidentally omitted from the will, *Re Boehm*, (1891) P. 247.

Mortimer on Probate lays down the following rules to be observed in such cases:—*First*, where the mind of the draftsman has really been applied to the particular clause then whether the error has arisen from the fact that he misunderstood the instructions of the testator or having understood the instructions has used inappropriate language in seeking to give effect to them, the testator is, in the absence of fraud, bound by the error so made as if it were his own even if the mistake were not directly brought to his notice and the Court will not omit from the probate the words so introduced.

Second, where the mind of the draftsman has never really been applied to the words of the particular clause and the words are introduced into the will *per incuriam* without advertance to their significance and effect by a mere clerical error

on the part of the draftsman or engrosser the testator is not bound by the mistake unless introduction of such words was brought to his notice. (Mortimer on Probate, pp. 107-111). The Court may admit to probate all that is written above the testator's signature and reject what is written below, but only if satisfied that such signature was intended by the testator to give effect to the words preceding it as his will. (Mortimer on Probate, p. 125), *Shama Charn v. Khettrmoni*, 27 Cal. 521 at 527.

Also, if a testator appoint one executor for a special purpose or a specific fund, and another executor for all other purposes, the latter may take probate save and except that purpose or fund. If there be no such other executor the residuary legatee may take administration (with the will annexed) of all and singular the effects of the deceased under the same exception. (Coote's Probate Practice, 12th Edn., p. 169).

Administration with exception.—Whenever the nature of the case requires that an exception be made, *e. g.*, when the testator has made a will for a particular or limited purpose or of his property only at one particular place and has died intestate as regards the rest, letters of administration may be granted subject to such exception, *i. e.*, excepting the property disposed of by the will, *In the goods of Cowar Suttia Krishna*, 10 Cal. 554.

Grants of the rest.

257. Whenever a grant with exception of probate, or of letters of administration with or without the will annexed, has been made, the person entitled to probate or administration of the remainder of the deceased's estate may take a grant of probate or letters of administration, as the case may be, of the rest of the deceased's estate.

(This is sec. 228 of the Succession Act X of 1865 and sec. 44 of the Probate and Administration Act V of 1881).

COMMENTARY.

V.—GRANTS OF THE REST OR GRANTS *CÆTERORUM*.

Grant under this section is technically called "*Grant Cæterorum*." This grant follows upon a limited grant. It is made when the testator has an executor for a special purpose or of a specific fund and another executor for all other purposes and the first mentioned executor has taken his limited probate, the other may take probate of the rest of the testator's estate. So when the deceased has made a will and appointed an executor for a special purpose, or for a specific fund or property only and has died intestate in all other respects his next-of-kin after the executor has taken a limited probate, may obtain letters of administration of the rest of the estate.

Grant of effects unadministered.

258. If an executor to whom probate has been granted has died, leaving a part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate.

(This is sec. 229 of the Succession Act X of 1865 and sec. 45 of the Probate and Administration Act V of 1881).

COMMENTARY.

(See next section.)

259. In granting letters of administration of an estate not fully administered, the Court shall be guided by the same rules as apply to original grants, and shall grant letters of administration to those persons only to whom original grants might have been made.

Rules as to grants of effects unadministered.

(This is sec 230 of the Succession Act X of 1865 and sec 49 of the Probate and Administration Act V of 1881).

COMMENTARY.

VI.—GRANT OF EFFECTS UNADMINISTERED OR ADMINISTRATION DE BONIS NON.

Grant under section 258 is called "Grant *de Bonis Non*." Upon the death of a sole executor or sole surviving executor leaving estate unadministered, the estate is unrepresented until some one takes out letters under this section, *Behary Lal v. Juggo Mohun*, 4 Cal. 5.

Under this Act the executor of the executor is not a derivative executor of the first testator, *De Souza v. Secretary of State*, 12 B. L. R. 423, as he is under the English law. (See ante, p. 254). When there are two or more executors and one of them dies before the estate is fully administered, the whole representation survives to the survivors or survivor and there is no necessity for the appointment of a new representative.

Letters of administration *de bonis non* shall be granted to those persons only to whom original grants might have been made, i. e., they will ordinarily be granted to the person entitled according to the general principles already stated in cases of administration *cum testamento annexo*. If the executor is also a beneficial residuary legatee, his representative will be entitled to the administration *de bonis non* of the original testator, *Moosa Haji v. Haji Abdul*, 5 Bom. L. R. 639. There is no provision in this Act if a sole administrator dies leaving a part of the estate unadministered. It is, however, submitted that if a sole administrator dies leaving a part of the estate unadministered, the same rules will apply and a new representative must be appointed, *In the goods of Giris Chandra Mitter*, 6 C. W. N. 581.

The administrator *de bonis non* has with respect to effects unadministered the same powers as the original executor or administrator. It is not necessary for him to ask for leave to dispose of the property, *Goods of Mary Hemming*, 23 Cal. 579; *Catherwood v. Chabaud*, 1 B. & C. 150. (Williams on Executors, 10th Edn., pp. 379-385. Coote's Probate Practice, 12th Edn., pp. 172-179).

260. When a limited grant has expired by efflux of time, or the happening of the event or contingency on which it was limited, and there is still some part of the deceased's estate unadministered, letters of administration shall be granted to those persons to whom original grants might have been made.

(This is sec. 231 of the Succession Act X of 1865 and sec. 47 of the Probate and Administration Act V of 1881).

COMMENTARY.

VII.—SUPPLEMENTAL OR *CESSATE* GRANTS.

Grants under this section are technically called "*Cessate* Grants".

Cessate grant is a re-grant of the *whole* of the deceased's estate just as it was sworn and embraced by the original grant. Grant *de bonis non* is a grant of that portion only of the estate which is unadministered. A *cessate* grant is an absolute and permanent grant, following a temporary one.

CHAPTER III.

Alteration and Revocation of Grants.

261. Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the Court, and the grant of probate or letters of administration may be altered and amended accordingly.

(This is sec. 232 of the Succession Act X of 1865 and sec. 48 of the Probate and Administration Act V of 1881).

COMMENTARY.

(See next section.)

262. If, after the grant of letters of administration with the will annexed, a codicil is discovered, it may be added to the grant on due proof and identification, and the grant may be altered and amended accordingly.

(This is sec. 233 of the Succession Act X of 1865 and sec. 49 of the Probate and Administration Act V of 1881).

COMMENTARY.

What errors may be rectified by Court.—The Court may make the following rectifications in the grant of probate or letters of administration which may be altered and amended accordingly.

(1) Errors in names and descriptions, *e. g.*, where the surname or Christian name of the deceased is misspelt or the *status* of the deceased, if a female is misstated, *In the goods of White*, 4 Cal. 582.

- (2) Errors in setting forth the time and place of the deceased's death, or,
- (3) Error in the purpose in a limited grant.

In all these cases the Testamentary Registrar will direct that the required amendments be made in the grants on the necessary proof and identification being adduced.

If the total amount of the estate is increased by the amendment, the estate must be resworn and the additional stamp duty must be paid.

If, after the grant of *letters of administration* with the will annexed, a codicil be discovered, it may be added to the grant on due proof and identification, and the grant altered and amended accordingly.

But if a codicil be discovered after the grant of probate, a *separate* probate is granted of that codicil and the first probate undergoes no alteration or amendment whatever. If, however, the appointment of the executors under the will is annulled or varied by the codicil, the probate of the will must be revoked, and a new probate granted of the will and the codicil together.

No alteration or amendment will be made where there is fraud or *mala fides* on the part of the grantee.

(Coote's Probate Practice, 12th Edn., pp. 185-189.)

Procedure.—Application for amendment must be made to the Court which issued the grant, *Sukumari v. Bharat Mandal*, 20 C. L. J. 148. An appeal lies from an order refusing amendment, *Gerindra v. Rajeswari*, 27 Cal. 5.

263. The grant of probate or letters of administration may be revoked or annulled for just cause.

Revocation or annulment for just cause.

Explanation.—Just cause shall be deemed to exist where—

- (a) the proceedings to obtain the grant were defective in substance ; or
- (b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case ; or
- (c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently ; or
- (d) the grant has become useless and inoperative through circumstances ; or
- (e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit

inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

Illustrations.

- (i) The Court by which the grant was made had no jurisdiction.
 - (ii) The grant was made without citing parties who ought to have been cited.
 - (iii) The will of which probate was obtained was forged or revoked.
 - (iv) A obtained letters of administration to the estate of B, as his widow, but it has since transpired that she was never married to him.
 - (v) A has taken administration to the estate of B as if he had died intestate, but a will has since been discovered.
 - (vi) Since probate was granted, a later will has been discovered.
 - (vii) Since probate was granted, a codicil has been discovered which revokes or adds to the appointment of executors under the will.
 - (viii) The person to whom probate was, or letters of administration were, granted has subsequently become of unsound mind.
- (This is sec. 234 of the Succession Act X of 1865 and sec. 50 of the Probate and Administration Act V of 1881 with the following alteration—The explanation "Just cause is" is changed into "Just cause shall be deemed to exist where")

COMMENTARY.

An application to revoke probate must be made under this section, *In re Pitamber Girdhar*, 5 Bom. 638.

What is "Just Cause".—The explanation of the words "Just cause" given in this section is not illustrative but is exhaustive, *Bal Gangadhar Tilak v. Sakwarbai*, 26 Bom. 792 at 798; *Annoda v. Kalikrishna*, 24 Cal. 95. Just cause is—

(1) That the proceedings to obtain the grant were defective in substance, *e. g.*, where the grant was made by a Court which had no jurisdiction or without citing parties who ought to have been cited, *Komollochun v. Nilruttun*, 4 Cal. 360; *In re Gunga Bissen Mundra*, 2 C. W. N. 607; *Hormusji v. Bai Dhanbaiji*, 12 Bom. 164. But if a person to whom citation has not been issued is otherwise aware of the proceedings, the absence of citation will not be a sufficient cause for revocation, *Kanhai Rout v. Jogendra Rout*, 1 Pat. 86; *Nistaring v. Brahmomoyi*, 18 Cal. 45; *Goods of Bhuggobutty*, 27 Cal. 927; *Prem Chand v. Surendra Nath*, 9 C. W. N. 190; *Dwijendra v. Golok Nath*, 21 C. L. J. 287; *Saroja v. Abhay Charan*, 41 Cal. 819. If, however, a person is a necessary party to probate proceedings, is not made such a party, neither his knowledge nor his acquiescence nor lapse of time will be a bar, *Ananorama v. Shiva*, 42 Cal. 480. If probate is granted in solemn form no one who has been cited or who has taken part in it or is otherwise cognisant of the proceedings can afterwards seek to have the grant cancelled, *In re Pitamber Girdhar*, 5 Bom. 638; *Re Bhuggobutty*, 27 Cal. 927.

(2) That the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case, *e. g.*, the will of

which probate was obtained was forged or revoked, *Debendra v. Adm.-General*, 33 Cal. 713.

(3) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently, *e. g.*, a woman obtains letters of administration on the ground of being the widow of the deceased but it subsequently transpires that she was never married to him or that the marriage was illegal.

(4) That the grant has become useless and inoperative through circumstances, *e. g.*, where a later will is discovered, *Bal Gangadhar Tilak v. Sakwarbai*, 26 Bom. 792; *Gour Chandra v. Sarut Sundari*, 40 Cal. 50; *Chandra Kumar v. Prosunna Kumar*, 25 C. W. N. 977.

(5) That the person to whom the grant was made has *wilfully* and without reasonable cause omitted to exhibit an inventory or account, or has exhibited an inventory or account which is untrue in a material respect, *Goculdas v. Purshottam*, 4 Bom. L. R. 978; *Prem Chand v. Surendra Nath*, 9 C. W. N. 190.

(6) Where the security furnished becomes worthless and an additional security is demanded, failure to furnish the additional security is a just cause for revocation, *Surendra Nath v. Amrita Lal*, 47 Cal. 115.

A grant can only be revoked of a probate or letters of administration which have issued. But when merely an order is made that probate should issue to an executor, but no probate has been taken out, the Court has no jurisdiction to revoke a grant which has never been issued, *Jamsetji v. Hirjibhai*, 37 Bom. 153.

Cases where Revocation will be Granted.—Grants may be revoked in the following cases :—

(1) If an executor obtains probate of a forged will. (Ill. iii.).

(2) If an executor obtains probate of a will whilst a suit is pending touching its validity in another Court, *viz.*, that of the deceased's domicile.

(3) If an executor, being minor, obtains probate on the suggestion or tacit understanding that he is of full age.

(4) If an executor obtains probate of the will of a living person.

(5) If a woman, not being legally married, obtains administration of the estate of the deceased as of her husband.

(6) If an illegitimate relative obtains administration as the next-of-kin of the deceased.

(7) If a will has been discovered after the grant of letters of administration.

(8) If a later will has been discovered after the grant of probate.

(9) If probate of a will is granted and a codicil is afterwards discovered which revokes or adds to the appointment of executors under the will. (Ill. vii.).

(10) If probate has been granted after the party applying has died.

(11) If two executors prove a will and one becomes a lunatic, probate is revoked and a new grant made to the sane executor; power being reserved to the lunatic of taking probate again on recovering his reason. This is in accorda

with the English practice. This Act is silent on this point but probably the same practice would be followed here.

(12) Where administration (with the will annexed) has been granted to two or more residuary legatees, of whom one subsequently becomes a lunatic, the grant is revoked and a fresh grant made to the sane administrator.

(13) Where one of two administrators becomes of unsound mind the grant is revoked and a new one made to the capable administrator.

(14) Where the sole executor or administrator to whom probate or letters of administration were granted, subsequently becomes a lunatic, the grant will be revoked. (*Ill. viii.*). The Court will make a new or subsidiary grant to the committee of his estate (if there be one) for his use and benefit until he shall become of sound mind. According to English practice where the new grant is made to a committee, the old grant remains at large. Under this Act it would seem that the old grant should be revoked.

(15) If an administrator to whom the grant is made is convicted of a criminal offence, *Goods of John Patterson*, 2 C. W. N. cccix.

(16) Where a creditor after grant of administration has paid himself his debt and left the country.

(Coote's Probate Practice, 12th Edn, pp. 197-206).

Cases where Revocation will not be Granted.—(1) A mere disagreement between the administrators is not a just cause for revocation, *Gour Chandra v. Sarat Sundari*, 40 Cal 50.

(2) A mere failure to file accounts is not a sufficient cause for revocation. There must be wilful omission to do so, *Gokuldas v. Purshottam*, 4 Bom. L. R. 799; *Bal Gangadhar Tilak v. Sakwarbai*, 26 Bom 792.

(3) Mismanagement or mal-administration by an executor is not a just cause for revocation, *Annoda v. Kallikrishna*, 24 Cal. 95; *Gour Chandra v. Sarat Sundari*, 40 Cal. 50; *Bal Gangadhar Tilak v. Sakwarbai*, 26 Bom. 792.

(4) Immoral conduct of the executor or his unfitness or incompetency, *Mohun Dass v. Lutchmun Dass*, 6 Cal. 11; *Hara Coomar v. Doorgamoni*, 21 Cal. 195.

(5) A mere failure to issue citation to a person where the person is otherwise aware of the proceedings is not a just cause for revocation, *Nistaring v. Brahmo-moyi*, 18 Cal. 45; *Goods of Bhuggobutty*, 27 Cal. 927.

(6) Mere ground of convenience or benefit to the estate will not be sufficient to revoke a grant, *Goods of Loveday*, (1900) P. 154; *In the goods of Heslop*, 1 Robert. 457.

(7) If administration is granted to a younger brother, the elder cannot have it revoked unless it was granted by surprise, *Ayliff v. Ayliff*, 2 Keb. 812. Where a niece obtains administration, a nephew cannot get it revoked, *Hill v. Bird*, Sty. 102.

(8) If administration is granted to a creditor and afterwards a creditor to a larger amount appears, it shall not be revoked for him, *Dubois v. Trant*, 12 Mod. 438.

Procedure.—The grant of probate is the decree of a Court which no other Court can set aside except for fraud or want of jurisdiction. When it is alleged that probate has been granted wrongly, the proper course to pursue is to apply to the Court which granted the probate to revoke the same, *Komolochun v. Nilruttun*, 4 Cal. 360. If a party alleges that the will is forged, the right procedure to be followed is to apply for revocation of probate under this section and not by a declaratory suit, *Komul Lochun v. Nilruttun*, 4 C. H. C. R. 175; *In the goods of Mohendra Narain Roy*, 5 C. W. N. 377. The test of jurisdiction made use of in application for grant of probate may also be applied under this section for revocation, viz., whether the deceased at the time of his death had his fixed place of abode or had some property within the jurisdiction of the District Judge, *In re Hurro Lall*, 8 Cal. 570. Application for revocation must be made on an affidavit showing that it has been wrongly or improperly obtained by a notice of motion, but the Court will not revoke a grant on the application of any other person without the consent or citation of the grantee. According to the English practice the revocation of the first grant and the substitution of the new one are made at the same time. (Coote's Probate Practice, pp. 202-203).

In proceedings for revocation of the grant on the ground of the invalidity of the will the proceedings should be by a regular suit and not by a notice of motion, *In the goods of Harendra Krishna Mukerjee*, 5 C. W. N. 383. But an application for revocation of the grant on the ground of forgery must be made under this section by affidavit on notice of motion, *In the goods of Mohendra Narain Roy*, *supra*. In a suit for revocation not only the executor or administrator but other persons interested in supporting the will such as purchaser from the executor may appear and oppose the application, *Kashi Chandra v. Gopi Krishna*, 19 Cal. 48. Mortimer on Probate lays down a different procedure, see pp. 584, 586—"A citation should be issued calling upon the executor or administrator to bring in the grant and to show cause why the same should not be revoked. A writ of summons is to be then issued making the applicant the plaintiff and the executor or administrator the defendant. The executor or administrator must lodge the grant with the Testamentary Registrar and enter appearance and then the action shall commence."

When a grant of probate or letters of administration is revoked, the person to whom the grant was made shall forthwith deliver up the probate or letters of administration to the Court which made the grant, and if such person wilfully and without reasonable cause omits so to deliver up the probate or letters, he becomes liable to a fine which may extend to one thousand rupees or to imprisonment of either description for a term which may extend to three months or with both.

Who can Apply for revocation.—All persons who are entitled to contest the will may also apply for revocation of the grant. As to these persons see *supra*, p. 290. Persons seeking to revoke the grant of probate or of letters of administration must prove that they have an interest sufficient to entitle them to a *locus standi* in Court, *Rahamtullah v. Rama Rao*, 17 Mad. 373. A widow of a predeceased son having no interest in the estate has no *locus standi*, *Re Gobinda Chandra*, 17 C. W. N. 1141.

An executor who has proved the will in common form cannot as such executor take proceedings to call in question the validity of that will and to apply for revocation of the probate, *In the goods of Chamberlain*, L. R. 1 P. & D. 316. *Srinath*

whether an executor against whose application for probate a caveat was entered could submit to arbitration the matter in dispute, *i. e.*, the genuineness and due execution of the will. Farran, C. J., was strongly of opinion that he could not.

There are two ways of proving wills, (1) by Common Form, or (2) by Solemn Form which latter form is also called proving *per testes*.

(1) Probate in Common Form.—The ordinary way of proving the will is in common form. A will is proved in common form when the executor presents the petition to which the will is annexed, accompanied by an affidavit of one of the attesting witnesses to the will (if procurable) before the judge without citing the parties interested and the judge thereupon grants probate, bearing the seal of the Court, if the will is perfect, and if all the formalities for its execution have been complied with. It is issued on the *ex-parte* application of the executor by the District Judge or by the District Delegate and by the High Court Judge. (Sec. 300).

Where a will contains alterations and interlineations and the alterations and interlineations are satisfactorily shown to have been made before the execution, it is usual to engross the probate copy of the will *fair*, inserting the words interlined in their proper places, and omitting words struck through or obliterated. But in cases where the construction of the will may be affected by the appearance of the original paper, the Court will order the probate to pass in *fac simile*, *i. e.*, showing the alterations and interlineations in their exact places in the copy of the will to be annexed to the probate as are in the original will. (Williams on Executors, 10th Edn., pp. 235-241).

(2) Probate in Solemn Form or "Per Testes".—Probate in solemn form is granted whenever there is a contention. It is almost always preceded by a suit and a sentence of the Probate Court pronouncing for the validity of so much of the will as appears on the face of the probate. After the executor has presented a petition, any person interested in the estate, if he wishes to contest the grant, files a caveat and an affidavit in support within eight days of the filing of the caveat, and the proceedings are thereupon converted into a regular suit, the petitioner being the plaintiff and the caveator being the defendant. Citations are issued to the next-of-kin, to the legatees, and to all the persons claiming to have an interest in the estate to see proceedings. The executor, the attesting witnesses (if any) and any person propounding the will are examined in open Court and cross-examined by the caveator, and if the Court is satisfied as to the due execution of the will, probate will be granted. It can only be granted by the District Judge and not by the District Delegate and by the High Court. (Sec. 300). ✓

If once probate is granted in common form, if a party after many years wants to have it proved in solemn form, the onus will lie heavily on him to prove that the will is not genuine, *Kali Das v. Ishan Chunder*, 31 Cal. 914 (P. C.).

The difference between a probate which has been granted in common form and a probate granted in solemn form is that the former is revocable and the latter, provided proper precautions have been taken, is irrevocable, except only in one case, that is, when a will of a later date is discovered after the decree is passed. The executor of the will proved in common form may at any time be compelled by a person having

an interest to prove it *per testes* in solemn form. But where a party who is thus entitled to call in the probate and put the executor to proof of the will, chooses to let a long time elapse before he takes this step, he is not entitled to any indulgence at the hands of the Court, *Brinda Chowdhraïn v. Radhica Chowdhraïn*, 11 Cal. 492. (Williams on Executors, 10th Edn, p 242; Coote's Probate Practice, 12th Edn., pp 353-354). But when once probate in solemn form has been granted, no one who has been cited or taken part in the proceedings, or who was cognisant of them can afterwards seek to have it cancelled, but possibly a review might be allowed on a proper case being made, *In re Pitamber Girdhar*, 5 Bom. 638; *In the goods of Bhuggobutty Dass*, 27 Cal. 927.

Who can Contest a Will.—The person contending the will, called the caveator, must show that he has some interest in order to entitle him to a *locus standi* in the Probate Court, *Hingeston v. Tucker*, 2 Sw. & Tr. 596. *Pirojshah v. Pestonji*, 34 Bom. 459.

As to what is sufficient interest see *In re Bhobosoonduri Dabee*, 6 Cal. 460 at 464; *In re Hurro Lalshaha*, 8 Cal. 570 at 575; *Abhiram v. Gopal Das*, 17 Cal. 48; *Rahamtullah v. Rama Rau*, 17 Mad. 373. Any interest, however slight, and even the bare possibility of an interest, is sufficient, *Kipping v. Ash*, 1 Rob. 270. But one denying the title of the testator and claiming adversely to him cannot be said to have any interest, *Abhiram v. Gopal Dass*, 17 Cal. 48; *Srigobind v. Mussti Laljhari*, 14 C. W. N. 119; *Pirojshah v. Pestonji*, 34 Bom. 459. If the interest is shown by a party contending the will, then the onus of proving that the will is genuine will be on the person propounding the will and not on the person contending that the will is a forgery, *Sukh Dei v. Kedar Nath*, 23 All. 405, (P. C.). A creditor of the deceased cannot controvert the validity of the will as he is only interested in seeing whether there are assets sufficient to pay the debts, *In re Desputty Singh*, 2 Cal. 208; *Menzies v. Pulbrook*, 2 Curt 851. But when administration has been granted to a creditor he may oppose the will, *Dabbs v. Chisman*, 1 Phillim. 159. (Williams on Executors, 10th Edn., pp. 245-246).

The following persons have a sufficient interest to entitle them to a *locus standi*, in a Probate Court to contest the will.

(1) Mortgagees of the estate of the deceased have an interest in such estate entitling them to intervene and be heard in opposition to an application to *withdraw* probate, *Kashi Chundra v. Gopi Krishna*, 19 Cal. 48; see also *Surbomongala v. Shashibhooshun*, 10 Cal. 413.

(2) An assignee of the estate of the deceased, whether he acquired the interest in the estate of the deceased at the time of his death or subsequently if the will is at variance with his interest, *Mokshadayin Dassi v. Karnadhar*, 19 C. W. N. 1108.

(3) A legatee, under a previous will, but not necessarily a legatee under the will in question, *Rahamtullah Sahib v. Rama Rau*, 17 Mad. 373; *Draupadi v. Rajkumari*, 22 C. W. N. 564.

(4) A judgment creditor of the next-of-kin of the testator, when the object of obtaining probate is to defraud the judgment creditor of the property which, but for the will, would have passed to the next-of-kin, *In re Bhobosoonduri Dabee*, 6 Cal. 460; *Kishen Dai v. Satyendra Nath*, 28 Cal. 441.

(5) An attaching creditor of the son's interest under Hindu law has sufficient interest to oppose the grant of the father's will, *Arakal v. Narayana*, 34 Mad. 405; *Surbomongala v. Shashibhooshun*, 10 Cal. 413; see, however, *Nilmoni Singh v. Umanath Mookerjee*, 10 Cal. 19 (P. C.), 10 I. A. 80, where their Lordships of the Privy Council expressed grave doubt whether an attaching creditor can oppose the grant of probate or apply to have it revoked.

(6) A creditor of the heir of the deceased under Hindu law, when the object of obtaining probate is to defraud the creditor by passing the property to the executor which would otherwise have come to the heir, *Umanath Mookhopadhyaya v. Nilmonay Sing*, 6 Cal. 429, 10 Cal. 19; *Lakhi Narain v. Multan Chand*, 16 C. W. N. 1099; *Kishen Dai v. Satyendra Nath*, 28 Cal. 441; see *contra*, *In re Desputty Singh*, 2 Cal. 208.

(7) An assignee of the interest of the widow, *Sheikh Azim v. Chandra Nath*, 8 C. W. N. 748, but not a widow who has a bare claim for maintenance and whose right is not affected by the will, *Garabini v. Pratap Chandra*, 4 C. W. N. 602; *In the goods of Gobinda*, 17 C. W. N. 1141.

(8) A daughter-in-law, if her right to maintenance is affected by the will, *Indubala v. Panchumani*, 19 C. W. N. 1169; see also, *Khettramoni v. Shyama Churn*, 21 Cal. 539.

(9) A presumptive reversioner to property with which a will deals has a sufficient interest, *In re Hurro Lall*, 8 Cal. 570, see also, *Shashi Bhushan v. Rajendra*, 40 Cal. 82.

(10) A purchaser from the heir of the property of the deceased has a *locus standi* to come in and allege that the will of the deceased is a forgery and should be revoked, *Komollochun v. Nilruttun*, 4 Cal. 360; *Muddun Mohun v. Kali Churn*, 20 Cal. 37; *Digambar v. Narayan*, 13 Bom. L. R. 38; *Lalit Mohan v. Navadip*, 28 Cal. 587; *Mokshadayini v. Karnadhar*, 19 C. W. N. 1108.

(For further commentary see "who can apply for revocation", ante p 287).

Jurisdiction of District Judge in granting and revoking probates, etc.

264. (1) The District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his district.

(2) Except in cases to which section 57 applies, no Court in any local area beyond the limits of the towns of Calcutta, Madras and Bombay, and the province of Burma, shall, where the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina, or an exempted person, receive applications for probate or letters of administration until the Local Government has, by a notification in the local official Gazette, authorised it so to do.

(Clause 1 is sec. 235 of the Succession Act N of 1855 and sec. 51 of the Probate and Administration Act V of 1851. Clause 2 is sec. 2 of the Probate and Administration Act V of 1851.)

COMMENTARY.

Procedure.—The procedure to be observed in granting and revoking probate and letters of administration is that laid down in the Civil Procedure Code except that an application is made not by a plaint but by petition, that on the petition being presented a summons is not to be issued but a citation is to be served on all the parties interested and that if a party wants to oppose the grant he must not file a written

Definition of caveat statement but he must enter a caveat. A caveat is a caution or warning giving notice to the Registrar not to issue any grant or to take any step without notice being first given to the party lodging the caveat. A caveat remains in force for eight days within which period an affidavit in support of the caveat must be filed. For form of caveat see schedule V. Mere citing a person in probate proceedings does not make him a defendant, *Saraji v. Abhoy*, 41 Cal. 819. It is only when the caveat is filed that the petition is numbered as a suit in which the petitioner becomes the plaintiff and the caveater becomes the defendant see sec. 295, *Kalce Tara v. Nobin Chunder*, 21 W. R. 84; *Chotalal v. Kabubai*, 22 Bom. 261. A caveat may be filed in anticipation of probate or letters of administration.

As soon as a caveat is entered the proceedings become contentious and the will must be proved before the Court, *Ghellabhai v. Nandubai*, 21 Bom. 335.

The procedure to be then followed is the Civil Procedure.

If no caveat is entered, the proceedings are non-contentious, and the grant is made *ex-parte* on the Registrar being satisfied as to the contents of the petition.

If a probate is once granted in solemn form it is irrevocable (see post p. 289). But if probate is refused not on merits but for want of proper proofs of will or for want of proper procedure, it may be again propounded, *Ramani v. Kumud*, 14 C. W. N. 924.

O. 11 of the Code applies, *Anilabala v. Rajendranath*, 43 Cal. 300.

O. 16, r. 20 of the Code does not apply to probate proceedings, *Ravji v. Vishnu*, 9 Bom. 241. O. 9, r. 9 does not apply. O. 26, r. 1 does not apply.

Every order made by the District Judge is appealable to the High Court (sec. 263).

A receiver may be appointed in a testamentary suit, *Yeshwant v. Shankar*, 17 Bom. 388; *Adm.-General v. Prem Lall*, 22 Cal. 1011 (P. C.).

269. (1) Until probate is granted of the will of a deceased person, or an administrator of his estate is constituted, the District Judge, within whose jurisdiction any part of the property of the deceased person is situate, is authorised and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he thinks fit, to appoint an officer to take and keep possession of the property.

When and how District Judge to interfere for protection of property.

(2) This section shall not apply when the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nor shall it apply to any part of the property of an Indian Christian who has died intestate.

(Clause 1 of this section is sec. 237 of the Succession Act X of 1865 and sec. 3 of the Native Christians Act VII of 1901)

COMMENTARY.

By clause 2 the section is not made applicable to Hindus, Muhammadans and Indian Christians. But its non-application does not in any way curtail the powers of the District Judge, *Peshwant v. Shankar*, 17 Bom. 388; *Hafizabai v. Kazi*, 19 Bom. 83.

Under this section a District Judge has power to make orders under certain circumstances so long as no person has been appointed administrator or a grant of probate made; but if once a grant is made the District Court has no power; the power vests in the High Court by virtue of sec. 302, *Winsor v. Winsor*, 44 Bom. 682.

270. Probate of the will or letters of administration to

When probate or administration may be granted by District Judge.

the estate of a deceased person may be granted by a District Judge under the seal of his Court, if it appears by a petition, verified as hereinafter provided, of the person applying for the same that the testator or intestate, as the case may be, at the time of his decease had a fixed place of abode, or any property, moveable or immoveable, within the jurisdiction of the Judge.

(This is sec. 240 of the Succession Act X of 1865 and sec. 56 of the Probate and Administration Act V of 1881).

COMMENTARY.

(See next sec.)

271. When the application is made to the Judge of a district

Disposal of application made to Judge of district in which deceased had no fixed abode

in which the deceased had no fixed abode at the time of his death, it shall be in the discretion of the Judge to refuse the application, if in his judgment it could be disposed of more justly or conveniently in another district, or, where the

application is for letters of administration, to grant them absolutely, or limited to the property within his own jurisdiction.

(This is sec. 241 of the Succession Act X of 1865 and sec. 57 of the Probate and Administration Act V of 1881)

COMMENTARY.

When District Judge may Grant Probate or Letters of Administration.—(1) When the deceased had a fixed place of abode within the jurisdiction of the Judge, *Ugrchand v. Surajmal*, 2 Bom L. R. 605, or

of his death, unless by a proceeding to revoke the grant if obtained by a fraud upon the Court.

(This is sec. 243 of the Succession Act X of 1865 and sec. 61 of the Probate and Administration Act V of 1881).

COMMENTARY.

If a grant is made on a petition duly verified, the contents of the petition are accepted as correct and the essential contents are that the deceased at the time of his death resided within the province or left property there and the relationship of the petitioner. If any one desires to challenge these statements, he must file a caveat before the grant is issued. If he wants to challenge these statements after the grant is made, he must take steps to revoke the grant and until that is done according to this section the statements are deemed to be conclusive, *In the goods of Rose Anne D'Silva*, 25 All. 355; *In the goods of Sassoon*, 21 Bom. 673.

If the petition contains false statements, the petitioner is liable to be punished for giving or fabricating false evidence. (See sec. 282.)

276. (1) Application for probate or for letters of administration, with the will annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the will or in the cases mentioned in sections 237, 238, and 239, a copy, draft, or statement of the contents thereof, annexed, and stating—

- (a) the time of the testator's death,
- (b) that the writing annexed is his last will and testament,
- (c) that it was duly executed,
- (d) the amount of assets which are likely to come to the petitioner's hands, and
- (e) when the application is for probate, that the petitioner is the executor named in the will.

(2) In addition to these particulars, the petition shall further

- (a) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and
- (b) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

274. (1) Where probate or letters of administration has or have been granted by a High Court or District Judge with the effect referred to in the proviso to section 273, the High Court or District Judge shall send a certificate thereof to the following Courts, namely :—

Transmission to High Courts of certificate of grants under proviso to section 273.

(a) when the grant has been made by a High Court, to each of the other High Courts ;

(b) when the grant has been made by a District Judge, to the High Court to which such District Judge is subordinate and to each of the other High Courts.

(2) Every certificate referred to in sub-section (1) shall be made as nearly as circumstances admit in the form set forth in Schedule IV, and such certificate shall be filed by the High Court receiving the same.

(3) Where any portion of the assets has been stated by the petitioner, as hereinafter provided in sections 276 and 278, to be situate within the jurisdiction of a District Judge in another province the Court required to send the certificate referred to in sub-section (1) shall send a copy thereof to such District Judge, and such copy shall be filed by the District Judge, receiving the same.

(This is sec. 242-A of the Succession Act X of 1865 and sec. 60 of the Administration Act V of 1981)

COMMENTARY.

- (a) When the grant is made by a High Court having effect in the whole of British India a certificate of the grant shall be sent to the other High Courts.
- (b) When the grant is made by a District Judge, having effect in the whole of British India, a certificate shall be sent to the Court to which such District Judge is subordinate, to the other High Courts and also a copy thereof to the District Judge within whose district the property is situate.
- (c) Such certificate shall be filed by the High Courts and by the District Judge receiving the same.

275. The application for probate or letters of administration, if made and verified in the manner hereinafter provided, shall be conclusive for the purpose of authorising the grant of probate or administration; and no such grant shall be impeached on any reason only that the testator or intestate had no fixed place of abode or no property within the district at the time

Conclusiveness of application for probate or administration if properly made and verified.

of his death, unless by a proceeding to revoke the grant if obtained by a fraud upon the Court.

(This is sec 243 of the Succession Act X of 1885 and sec. 61 of the Probate and Administration Act V of 1881).

COMMENTARY.

If a grant is made on a petition duly verified, the contents of the petition are accepted as correct and the essential contents are that the deceased at the time of his death resided within the province or left property there and the relationship of the petitioner. If any one desires to challenge these statements, he must file a caveat before the grant is issued. If he wants to challenge these statements after the grant is made, he must take steps to revoke the grant and until that is done according to this section the statements are deemed to be conclusive, *In the goods of Rose Anne D'Silva*, 25 All. 355; *In the goods of Sassoon*, 21 Bom. 673.

If the petition contains false statements, the petitioner is liable to be punished for giving or fabricating false evidence. (See sec. 282.)

276. (1) Application for probate or for letters of adminis-

Petition for probate.

tration, with the will annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the will or in the cases mentioned in sections 237, 238, and 239, a copy, draft, or statement of the contents thereof, annexed, and stating—

- (a) the time of the testator's death,
- (b) that the writing annexed is his last will and testament,
- (c) that it was duly executed,
- (d) the amount of assets which are likely to come to the petitioner's hands, and
- (e) when the application is for probate, that the petitioner is the executor named in the will.

(2) In addition to these particulars, the petition shall further

- (a) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and
- (b) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(3) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another province, the petition shall further state the amount of such assets in each province and the District Judges within whose jurisdiction such assets are situate.

(This is sec. 214 of the Succession Act X of 1865 and sec. 62 of the Probate and Administration Act V of 1881).

COMMENTARY.

Contents of the Petition for Probate.—The petition for probate shall be in the English language or in the language of the Court and must contain the following:—

(1) The will must be annexed to the petition. If the will is not in English or in the language of the Court, its official translation must accompany.

(2) Time of the testator's death.

(3) The writing annexed is the last will and that it was duly executed.

(4) The amount of assets which are likely to come to the petitioner's hands and the value thereof for the purposes of probate duty, *Kuppiyammal v. Ammani Ammal*, 22 Mad. 345. All the assets likely to come whether within or without British India must be mentioned, *In re Ezekiel*, 21 Bom. 139 at 152.

(5) The petitioner is the executor named in the will.

(6) The deceased had his fixed place of abode or some property moveable or immoveable within the jurisdiction of the Judge, when the application is to the District Judge.

(7) When the application is to a District Delegate, that the deceased resided within the jurisdiction of such Delegate.

(8) When the application is made for probate to have effect throughout the whole of British India, whether any application for probate or for letters of administration was made to any other Court and if so, with what result.

The petition must be verified by the petitioner and by at least one of the attesting witnesses to the will when procurable. In practice the attesting witness makes an affidavit.

If the petition is for probate of a nuncupative or oral will, then in addition to the statements mentioned above, the petition should set out either in the petition itself or by a separate affidavit the contents of the oral will to be propounded and when and to whom the same were made, see *In re the Will of Haji Mahomed Abba*, 24 Bom. 8.

Application in forma pauperis.—Where an executor is not in possession of the property of his testator and cannot get possession of it and where he has not himself the means of paying the necessary fees, he may be allowed to petition, and if entitled thereto to obtain probate in forma pauperis, *In the matter of the Will of Dawubai*, 18 Bom. 237.

The order of the District Judge granting or refusing probate under this section is a decree, *Miss Eva Mountstephens v. Mr. Hunter*, 35 All. 448.

COMMENTARY.

Contents of the Petition for Letters of Administration.—(1) Time and place of the deceased's death.

(2) That no will has been found though diligent search made.

(3) Family or relatives of the deceased and their respective residences.

(4) The right of the petitioner to obtain letters of administration.

(5) That the deceased left some property within the jurisdiction of the District Judge or District Delegate. It is not necessary for probate Court to decide what assets are likely to come to the hands of the petitioner, but it is the duty of the Court to see whether there is any estate to be administered. If there is no estate remaining to be administered the grant must be refused, *Lalit Chandra v. Baikuntha*, 14 C. W. N. 463. If more than one petition is presented by different parties for the administration of the same estate, the practice of the Bombay High Court is to consolidate the petitions and if both the petitioners are equally entitled to the grant, to issue a joint grant. See the petition in *re Kavasji K. Patuck*, dated the 7th September 1896.

(6) The amount of assets which are likely to come to the petitioner's hands and the value thereof for the purpose of administration duty.

(7) When the application is to the District Delegate that the deceased at the time of his death resided within his jurisdiction.

(8) When the application is made for letters of administration to have effect throughout the whole of British India, whether an application for letters of administration was made to any Court, and if so, with what result. (See sec. 279).

279. (1) Every person applying to any of the Courts mentioned in the proviso to section 273 for probate of a will or letters of administration of an estate intended to have effect throughout British India, shall state in his petition, in addition to the matters respectively required by section 276 and section

Addition to statement in petition, etc. for probate or letters of administration in certain cases.

278, that to the best of his belief no application has been made to any other Court for a probate of the same will or for letters of administration of the same estate, intended to have such effect as last aforesaid,

or, where any such application has been made, the Court to which it was made, the person or persons by whom it was made and the proceedings (if any) had thereon.

(2) The Court to which any such application is made under the proviso to section 273 may, if it thinks fit, reject the same.

(This is sec. 248-A of the Succession Act X of 1885 and sec. 65 of the Probate and Administration Act V of 1882).

280. The petition for probate or letters of administration shall in all cases be subscribed by the petitioner and his pleader, if any, and shall be verified by the petitioner in the following manner, namely :—

Petition for probate, etc., to be signed and verified.

" I (A. B.), the petitioner in the above petition, declare that what is stated therein is true to the best of my information and belief."

(This is sec. 242 of the Succession Act X of 1865 and sec. 66 of the Probate and Administration Act V of 1881)

COMMENTARY.

The Administrator General is not required to verify the petition otherwise than by his signature under the Administrator Generals Act, *In the goods of Audall*, 26 Cal. 404.

281. Where the application is for probate, the petition shall also be verified by at least one of the witnesses to the will (when procurable) in the manner or to the effect following, namely :—

Verification of petition for probate, by one witness to will

" I (C. D.), one of the witnesses to the last will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (or mark) thereto (or that the said testator acknowledged the writing annexed to the above petition to be his last will and testament in my presence).

(This is sec. 248 of the Succession Act X of 1865 and sec. 67 of the Probate and Administration Act V of 1881).

COMMENTARY.

Procedure if no witness is procurable see H. C. Rules.

282. If any petition or declaration which is hereby required to be verified contains any averment which the person making the verification knows or believes to be false, such person shall be deemed to have committed an offence under section 193 of the Indian Penal Code.

Punishment for false averment in petition or declaration.

(This is sec. 249 of the Succession Act X of 1865 and sec. 68 of the Probate and Administration Act V of 1881)

Powers of District Judge.

283. (1) In all cases the District Judge or District Delegate may, if he thinks proper,—

(a) examine the petitioner in person, upon oath ;

- (b) require further evidence of the due execution of the will or the right of the petitioner to the letters of administration, as the case may be;
- (c) issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.

(2) The citation shall be fixed up in some conspicuous part of the court-house, and also in the office of the Collector of the district and otherwise published or made known in such manner as the Judge or District Delegate issuing the same may direct.

(3) Where any portion of the assets has been stated by the petitioner to be situate within the jurisdiction of a District Judge in another province, the District Judge issuing the same shall cause a copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it were a citation issued by himself, and shall certify such publication to the District Judge who issued the citation.

(This is sec. 250 of the Succession Act X of 1885 and sec. 69 of the Probate and Administration Act V of 1881).

COMMENTARY.

Limitation.—Under the Indian Limitation Act No. IX of 1908 there is no period prescribed within which a petition for probate or for letters of administration should be made after the deceased's death, *Manekbai v. Manekji*, 7 Bom. 213; *Re Ishan Chunder Roy*, 6 Cal. 707; *Kash Chundra v. Gopi Krishna*, 19 Cal. 48. It may therefore be presented at any time after the death of the deceased, even many years after the death, *Gnanamuthu v. Vana Koilpillai*, 17 Mad. 379. But if the application is made more than three years after the death, the petitioner must state the reason of the delay in his petition, *Binodini v. Hriday Nath*, 22 C. W. N. 424. (Rule 563, Bombay High Court Rules), *Kalidas v. Ishan Chunder*, 9 C. W. N. 49 (P. C.).

Where the petitioner comes after considerable delay and if knowledge or acquiescence in the grant is proved on his part, the Court will not allow him to reopen the grant unless he offers some reasonable and true explanation of the delay, *Manorama v. Shiva Sundari*, 42 Cal. 480; *Binodini v. Hriday Nath*, 22 C. W. N. 424; *Kunja Lal v. Kailash Chandra*, 14 C. W. N. 1068; *Radhashyam v. Ranga Sundari*, 24 C. W. N. 541.

284. (1) Caveats against the grant of probate or administration may be lodged with the District Judge or a District Delegate.

(2) Immediately on any caveat being lodged with any District Delegate, he shall send copy thereof to the District Judge.

(3) Immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction it is alleged the deceased had a fixed place of abode at the time of his death, and to any other Judge or District Delegate to whom it may appear to the District Judge expedient to transmit the same.

(4) The caveat shall be made as nearly as circumstances admit in the form set forth in Schedule V.

(*Clauses 1, 2, & correspond with sec. 251 and clause 4 is sec. 252 of the Succession Act X of 1865 and secs. 70 and 71 of the Probate and Administration Act V of 1881.*)

285. No proceeding shall be taken on a petition for probate or letters of administration after a caveat against the grant thereof has been entered with the Judge or District Delegate to whom the application has been made or notice has been given of its entry with some other Delegate, until after such notice to the person by whom the same has been entered as the Court may think reasonable.

(*This is sec. 253 of the Succession Act X of 1865 and sec. 72 of the Probate and Administration Act V of 1881*)

COMMENTARY.

Procedure.—Any person intending to oppose the issuing of a grant of probate or letters of administration must file a caveat. A caveat is a caution or warning entered in the Testamentary Court giving notice to the Registrar not to issue any grant or to take any step in reference to the estate of the deceased named in the writing without notice being first given to the party or to the solicitor of the party who has lodged the caveat. It is in this form: "Let nothing be done in the matter of the estate of A. B., late of deceased, who died on the _____ day of _____ at _____ without notice to C. D. of _____". After the caveat is filed the proceedings take as nearly as may be the form of a regular suit in which the petitioner for probate or letters of administration as the case may be shall be the plaintiff and the caveator shall be the defendant. See sec. 295.

Any person having an interest in the property of the deceased is entitled to put in a caveat. He must show some interest, *Abhiram v. Gopal Das*, 17 Cal. 48; *Pirojshah v. Pestonji*, 34 Bom. 459. Caveat is usually entered after the petition is presented and before the grant is issued. But it may be lodged before the petition is presented, *Jarat Kumari v. Bissessur*, 39 Cal. 245 at 249. After the caveat is lodged the caveator, if he challenges the will, must file an affidavit in support of the caveat within eight days. (See High Court Rules 600); see also, *Chotalal v. Bai Kabubai*, 22 Bom. 261.

286. A District Delegate shall not grant probate or letters of administration in any case in which there is contention as to the grant, or in which it otherwise appears to him that probate or letters of administration ought not to be granted in his Court.

District Delegate
when not to grant probate
or administration.

Explanation.—"Contention" means the appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding.

(This is sec. 253-A of the Succession Act X of 1865 and sec. 73 of the Probate and Administration Act V of 1881 and sec. 7 of the District Delegates Act VI of 1881).

287. In every case in which there is no contention, but it appears to the District Delegate doubtful whether the probate or letters of administration should or should not be granted, or when any question arises in relation to the grant, or application for the grant, of any probate or letters of administration, the District Delegate may, if he thinks proper, transmit a statement of the matter in question to the District Judge, who may direct the District Delegate to proceed in the matter of the application, according to such instructions as to the Judge may seem necessary, or may forbid any further proceeding by the District Delegate in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Judge.

Power to transmit
statement to District
Judge in doubtful
cases where no conten-
tion.

(This is sec. 253-B of the Succession Act X of 1865 and sec. 74 of the Probate and Administration Act V of 1881 and sec. 7 of the District Delegates Act VI of 1881).

288. In every case in which there is contention, or the District Delegate is of opinion that the probate or letters of administration should be refused in his Court, the petition, with any documents which may have been filed therewith, shall be returned to the person by whom the application was made, in order that the same may be presented to the District Judge, unless the District Delegate thinks it necessary, for the purposes of justice, to impound the same, which he is hereby authorised to do; and, in that case, the same shall be sent by him to the District Judge.

Procedure where
there is contention,
or District Delegate
thinks probate or
letters of administra-
tion should be refus-
ed in his Court.

(This is sec. 253-C of the Succession Act X of 1865 and sec. 75 of the Probate and Administration Act V of 1881 and sec. 7 of the District Delegates Act VI of 1881).

COMMENTARY.

For the meaning of the word "Contention" see "Explanation" to sec. 286; see also the following cases, *Annamalai v. Malayandi*, 29 Mad. 426; *Upendra v. Mohri*, 31 Cal. 745; *Chotalal v. Bai Kabubai*, 22 Bom. 261; *Nuzhatuddowla v. Mirza Kurratulain*, 31 Cal. 186.

289. When it appears to the District Judge or District Delegate that probate of a will should be granted, he shall grant the same under the seal of his Court in the form set forth in Schedule VI.

Grant of probate to be under seal of Court.

(This is sec. 254 of the Succession Act X of 1865 and sec. 76 of the Probate and Administration Act V of 1881).

290. When it appears to the District Judge or District Delegate that letters of administration to the estate of a person deceased, with or without a copy of the will annexed, should be granted, he shall grant the same under the seal of his Court in the form set forth in Schedule VII.

Grant of letters of administration to be under seal of Court.

(This is sec. 255 of the Succession Act X of 1865 and sec. 77 of the Probate and Administration Act V of 1881)

291. (1) Every person to whom any grant of letters of administration, other than a grant under section 241, is committed, shall give a bond to the District Judge with one or more surety or sureties, engaging for the due collection, getting in, and administering the estate of the deceased, which bond shall be in such form as the Judge may, by general or special order, direct.

(2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person—

(a) the exception made by sub-section (1) in respect of a grant under section 241 shall not operate ;

(b) the District Judge may demand a like bond from any person to whom probate is granted.

(Clause 1 is sec. 256 of the Succession Act X of 1865. Clause (2) is new. The corresponding sec. 78 of the Probate and Administration Act V of 1881 was as follows:—
"Every person to whom any grant of letters of administration is committed, and, if the Judge so direct, any person to whom Probate is granted shall give a bond to the Judge of the District Court to ensure for the benefit of the Judge for the time being, with one or more surety or sureties, engaging for the due collection getting in, and administering the estate of the deceased, which bond shall be in such form as the Judge from time to time by any general or special order, directs".)

COMMENTARY.

Administration Bond.—Under this Act under clause (1) as regards Europeans, Parsis and Indian Christians only an administrator is required to execute the bond. An executor is never required to give bond for the due administration of the estate, *Ran Bahadur v Moharane Rajrup*, 4 C. H. C. R. 498; (see *contra*, *In re Juggodishari Dahi*, 7 Cal. 84; it is submitted that this is not according to this Act); but under clause (2) as regards Hindus and Muhammadans the Court is empowered to take a bond even from an executor.

In all cases when letters of administration are granted, the person to whom the same are granted is required to execute a bond to the Judge with one or more sureties engaging for the due collection getting in and administering the estate of the deceased, *Giribala v. Bijoy Krishna*, 31 Cal. 688. It may, however, be varied by special order of the Court in case of limited or special administration, *In the goods of Gubboy*, 26 Cal. 408. According to English practice a surety is dispensed with where the estate is administered by the Court of Chancery or in bankruptcy and where the person applying for grant was entitled to the whole estate and all the debts had been paid. (See Mortimer on Probate, p. 464). The Court can dispense with sureties altogether taking only the bond from the administrator upon sufficient ground being shown. (See Coote's Probate Practice, 15 Edn., p. 126). An application for leave to dispense with the sureties should be made by motion to the Judge.

The bond is to be taken before the grant and not after, *Giribala v. Bijoy Krishna*, 31 Cal. 688. Under this section the Court has no power to dispense with the bond from an administrator, *In the goods of Gubboy*, 26 Cal. 408. In the case of executors under the Probate Act the Court is given discretion, *Surendra Nath v. Amrita Lal*, 47 Cal. 115. The section is not limited to cases where the grant is first made; if the bond becomes inoperative by the death of the surety or otherwise, the District Judge has jurisdiction to take a second bond with fresh sureties if necessary, *Raj Narain v. Ful Kumari*, 29 Cal. 68.

Exceptions.—(1) When limited letters of administration are granted to the attorney of the absent *executor* under sec. 241, the person to whom the same are granted shall not be required to execute the bond.

(2) When letters of administration are granted to the Administrator-General under the Administrator-General's Act he is not required to enter into any administration bond or to give any security. (Sec. 29).

Amount of the Bond.—Usually the amount of the bond is double the value of the estate, but the Judge has discretion to fix the amount. The Court has power to dispense with sureties altogether, but it has no power to dispense with the bond, *In the goods of De la Farque*, (1862) 2 Sw. & Tr. 631; *In the goods of Powis*, 34 L. J. P. & M. 55.

Justifying Sureties.—Justifying sureties to the administration bond are called for at the Court's discretion according to the circumstances of each case. In practice the High Court of Bombay requires justifying sureties in the following cases:—

1. When any person takes out letters of administration in default of the appearance of any person cited.

2. When any person takes out letters of administration for the use and benefit of a lunatic unless he be a committee of the estate of such lunatic appointed by Court.

3. When any person takes out letters of administration for the use and benefit of a minor.

4. When any person entitled to a portion only of the estate takes out letters of administration to the whole estate,

(Rule 583, High Court Rules).

Number and Qualification of Sureties.—The sureties required may be one or more. The High Court of Bombay requires two sureties. Solicitors are accepted as sureties but not solicitor's clerks. A surety described as a managing clerk, manager, clerk, secretary, accountant, cashier, book-keeper, gentleman of no occupation or insurance agent is not accepted without further explanation. (Coote's Probate Practice, 15th Edn., p. 124).

Form of Bond.—See form No. 95 of the Bombay High Court Rules.

292. The Court may, on application made by petition and on being satisfied that the engagement of any such bond has not been kept, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as the Court may think fit, assign the same to some person, his executors or administrators, who shall thereupon be entitled to sue on the said bond in his or their own name or names as if the same had been originally given to him or them instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustees for all persons interested, the full amount recoverable in respect of any breach thereof.

(This is sec 287 of the Succession Act X of 1865 and sec 79 of the Probate and Administration Act V of 1831).

COMMENTARY.

Liability of Sureties.—So long as letters of administration are unrevoked, the sureties are responsible and liable to make good the defalcations of the administrator, even if the grant is subsequently revoked, *Debendra Nath v. Administrator-General*, 33 Cal. 713, 35 Cal. 955 (P. C.), 35 L. A. 109. The Court will not discharge the original sureties to an administration bond and allow others to be substituted for them, *In the goods of Stark*, L. R. 1 P. & D. 76. A suit will not lie by a surety for being discharged or in the alternative to direct the administrator to complete administration, *Subroya v. Ragammill*, 28 Mad. 161; *Kandhya Lal v. Manki*, 31 All. 56. There is nothing in this Act to entitle a surety to an administration bond, when the administration is complete, to apply to the Court to have the bond vacated and to be discharged from suretyship, *In the matter of Arthur Gerald Norton Knight*, 33 Mad. 373.

A new bond or additional security may be required by Court if the nature of the estate necessitates it and where new conditions arise such as unforeseen increase of assets or break down of one of the sureties, *Surrendra Nath v. Amrita Lal*, 47 Cal. 115. The Calcutta High Court holds that the surety bond is a continuing guarantee under sec. 129 of the Contract Act and may be revoked, *Raj Narain v. Ful Kumari*, 29 Cal. 68; this view is not accepted by the Madras High Court in *Subroya v. Rajammill*, 28 Mad. 161, as also by the Bombay High Court, *Bai Sorni v. Chokshi Ishwardas*, 19 Bom. 245. The Allahabad High Court also adopts the same view as the Madras and Bombay High Courts, *Kandhya Lal v. Manki*, 31 All. 56. According to English practice the original surety cannot by giving notice get himself discharged. (See Mortimer on Probate, p. 465).

Assignment of the Bond.—When the engagement of the bond is broken by the administrator, by not administering the estate properly or by not truly accounting for the same, the Court may assign the bond to some person, his executors, or administrators who shall thereupon be entitled to sue the administrator on the bond *in his own name*, *Kalimuddin v. Meharui*, 39 Cal. 563. The application for assignment must be by way of petition. (Mortimer on Probate p. 468). The administration bond may be assigned to the Administrator-General, *Debendra Nath v. Administrator-General*, 33 Cal. 713, 35 I. A. 109

An administration bond is not an instrument of the kind referred to sec. 74 of the Contract Act so as to make the obligor liable to pay the whole amount. No more damage than what is actually suffered is recoverable. If failure to file an inventory and account in time has not resulted in any damage nothing can be recovered under the bond, *Lachmandas v. Chater*, 10 All. 29; *Cursetjee v. Dadabhai*, 19 Mad. 425.

293. No probate of a will shall be granted until after the expiration of seven clear days, and no letters of administration shall be granted until after the expiration of fourteen clear days from the day of the testator or intestate's death.

Time for grant of probate and administration

(This is sec. 258 of the Succession Act X of 1865 and sec. 80 of the Probate and Administration Act V of 1881).

COMMENTARY.

The period is to be calculated excluding the day of the death of the testator. It is only that grant cannot be made but an application for probate or letters can be made immediately after the death of the deceased. Letters of administration with the will annexed may be granted after the expiration of seven days from the death of the testator, *In the goods of Wilson*, 1 Cal. 149.

294. (1) Every District Judge, or District Delegate, shall file and preserve all original wills, of which probate or letters of administration with the will annexed may be granted by him, among the records of his Court, until some public registry for wills is established.

Filing of original wills of which probate or administration with will annexed granted.

(2) The Local Government shall make regulations for the preservation and inspection of the wills so filed.

(This is sec. 259 of the Succession Act X of 1865 and sec. 81 of the Probate and Administration Act V of 1881).

COMMENTARY.

When the will is proved, the original is deposited in the Court registry and a copy thereof is made out under the seal of the Court and delivered to the executor, together with a certificate of its having been proved; and such copy and certificate are usually styled the probate.

295. In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant.

(This is sec. 261 of the Succession Act X of 1865 and sec. 83 of the Probate and Administration Act V of 1881).

COMMENTARY.

The proceedings become contentious not on filing of the caveat but on the filing of an affidavit in support of the caveat, *Chotalal v. Bai Kabubai*, 22 Bom. 261; *Pakiam v. Innasi*, 19 Mad. 458; *Haji Bibi v. H. H. Sir Sultan*, 10 Bom. L. R. 327. If at the hearing the caveator does not appear, the Court should not merely dismiss the caveat but should order the issue of grant if the petition is otherwise in order. In *Pakiam v. Innasi*, *supra*, on a petition for probate a caveat was entered and the petitioner withdrew his petition; subsequently the caveator applied for letters of administration and the petitioner entered caveat to oppose the grant; it was held he was entitled to propound the will in opposition to the application for letters of administration.

296. (1) When a grant of probate or letters of administration is revoked or annulled under this Act, the person to whom the grant was made shall forthwith deliver up the probate or letters to the Court which made the grant.

Surrender of revoked probate or letters of administration.

(2) If such person wilfully and without reasonable cause omits so to deliver up the probate or letters, he shall be punishable with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to three months, or with both.

(This is sec. 333 of the Succession Act X of 1865 and sec. 157 of the Probate and Administration Act V of 1881).

297. When a grant of probate or letters of administration is revoked, all payments *bona fide* made to any executor or administrator under such grant before the revocation thereof shall notwithstanding such revocation be a legal discharge to the person making the same; and the executor or administrator who has acted under any such revoked grant may retain and reimburse himself in respect of any payments made by him which the person to whom probate or letters of administration may afterwards be granted might have lawfully made.

Payment to executor or administrator before probate or administration revoked.

(This is sec. 334 of the Succession Act X of 1865 and sec. 158 of the Probate and Administration Act V of 1881).

COMMENTARY.

Consequences of Revocation.—Where any probate or letters of administration are revoked all payments *bona fide* made to the executor or administrator under the grant before the revocation shall, notwithstanding the revocation, be a legal discharge to the person making the same. It would appear, therefore, that under this Act, until the grant is revoked, all payments made to the executor or administrator would be a valid discharge, notwithstanding the fact that the grant was obtained surreptitiously, fraudulently, or by concealment of material facts. In other words, the grant is not void *ab initio* but is voidable. (See the "Craster Fraud Case," *Craster v. Thomas*, (1909) 2 Ch. 348; *Hawson v. Shelley*, (1914) 2 Ch. 13. In the Calcutta case of *Gopal Dass v. Budree Dass*, 33 Cal. 657, it was also held that a grant of letters of administration obtained by suppressing a will containing no appointment of executors was not void *ab initio* and a sale of property by an administrator to a purchaser who was ignorant of the suppression of the will is valid, although letters of administration were revoked after the sale. (See also, *Debendra Nath v. Administrator-General*, 33 Cal. 713 in appeal 35 Cal. 955 (P. C.), 35 I. A. 109.

Forged Will.—In *Pandit Prayag Raj v. Gou Karan*, 6 C. W. N. 787, it was held that acts done under a will which is declared to be a forgery are void. But there has been a divergence of opinion. There is no distinction under this Act as to whether the grant is void or voidable and the better view seems to be to protect the rights of *bona fide* transferees for value without notice of any fraud or circumstance affecting the grant, *Sailaja v. Jadu Nath*, 19 C. W. N. 240.

According to English Law also there is a distinction observed between grants which are void and grants which are voidable, and the test adopted there to distinguish the one from the other is this: English Law. Where the grant is in derogation of the right of an executor it is void, but where the grant is in derogation of the right of the next-of-kin or residuary legatee, it is voidable.

If the grant is void, the mesne or intermediate acts of the executor or administrator done between the grant and its revocation shall be of no validity. If the grant is voidable, the mesne acts of the executor or administrator will stand good, *Abram v. Cunningham*, 2 Lev. 182; *Allen v. Dundas*, 3 T. R. 125; *Ellis v. Ellis*, (1905) 1 Ch. 613. (Williams on Executors, 10th Edn., pp. 460-466).

The decisions in *Abram v. Cunningham* and *Ellis v. Ellis*, are overruled in *Hawson v. Shelley*, (1914) 2 Ch. 13 and the better view seems to be in England also to regard all grants as voidable and to protect *bona fide* transferees for value without notice, *Fitzpatrick v. M'Glone*, (1897) 1 I. Ir. 542. (See Mortimer on Probate, p. 436).

298. Notwithstanding anything hereinbefore contained, it shall, where the deceased was a Muhammadan, Buddhist or exempted person, or a Hindu, Sikh or Jaina to whom section 57 does not apply, be in the discretion of the Court to make an order refusing, for reasons to be

Power to refuse letters of administration.

recorded by it in writing to grant any application for letters of administration made under this Act.

(This is sec. 85 of the Probate and Administration Act V of 1881).

COMMENTARY.

This section only empowers the Court to refuse grant of letters of administration in cases of Hindus (not governed by the Hindu Wills Act) and Muhammadans and is discretionary. The Court has no power under this section to refuse grant of probate, *Hara Coomar v. Doorgamoni*, 21 Cal. 195; *Pran Nath v. Jado Nath*, 20 All. 189.

299. Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure, 1908, applicable to appeals.

Appeals from orders
of District Judge

(This is sec. 263 of the Succession Act X of 1865 and sec. 86 of the Probate and Administration Act V of 1881)

COMMENTARY.

An appeal lies under this section from an order :—admitting a person as caveator, *Abhiram v. Gopal Dass*, 17 Cal. 48; see *contra Khettramoni v. Shyama Churn*, 21 Cal. 539; from an order dismissing an application for probate, *Shaukh Azim v. Chandra Nuth*, 8 C. W. N. 748; from an order granting or refusing probate, *Miss Eva Mountstephens v. Mr. Hunter Garnett*, 35 All 448. In the following cases no appeal was allowed, *Lucas v. Lucas*, 20 Cal. 245; *Brojo Nath v. Dismony*, 2 C. H. C. R. 589; *Sheikh Kalimuddin v. Meharui*, 39 Cal. 563, *Lakhi Narain v. Multan Chand*, 16 C. W. N. 1099. An appeal lies under the Letters Patent from the decision of a single Judge of the High Court on appeal from the order of the District Judge granting probate, *Umrao Chand v. Bindraban*, 17 All 475.

300. (1) The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

Concurrent jurisdiction
of High Court

(2) Except in cases to which section 57 applies, no High Court, in exercise of the concurrent jurisdiction hereby conferred over any local area beyond the limits of the towns of Calcutta, Madras and Bombay, and the province of Burma, shall, where the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, receive applications for probate or letters of administration until the Local Government has, by a notification in the local official Gazette, authorised it so to do.

[Clause (1) is sec. 261 of the Succession Act X of 1865 and sec. 87 of the Probate and Administration Act V of 1881. Clause (2) is sec. 2 of the Probate and Administration Act V of 1881].

COMMENTARY.

In *Nagendrabala v. Kashipati*, 37 Cal. 224, it was held that the High Court had jurisdiction to make a grant on the original side in any case in which the District Court had jurisdiction and that it was not necessary that any portion of the property should be within the limits of the original jurisdiction. The "High Court" mentioned in this section is not merely confined to the appellate jurisdiction but includes original jurisdiction, *In the goods of Mohendra*, 5 C. W. N. 377.

301. The High Court may, on application made to it, suspend, remove or discharge any private executor or administrator and provide for the succession of another person to the office of any such executor or administrator who may cease to hold office, and the vesting in such successor of any property belonging to the estate.

Removal of executor or administrator and provision for successor.

(This is sec. 264-A of the Succession Act X of 1865 and sec. 87-A of the Probate and Administration Act V of 1851).

COMMENTARY.

Discharge of Executor.—An executor who has once proved the will cannot discharge himself from administering the estate of the testator except in the modes stated below. As soon as an executor has discharged the debts of the testator and has paid the funeral and testamentary expenses and also paid the legacies bequeathed by the will and has invested the surplus in authorized securities he ceases to be an executor and becomes a trustee in the proper sense of the word and may then be discharged from the office like any other trustee, *Ex-parte Amerchand Madhovi*, 29 Bom. 188. (Lewin on Trusts, 11th Edn., p. 816, sec. 71 Indian Trusts Act II of 1882).

Before the enactment of sec. 264-A of the Succession Act X of 1865, the Court had no power to remove or discharge an executor or administrator, but the Court appointed receiver, *Hafizabai v. Kazi Abdul Karim*, 19 Bom. 83. A similar provision is incorporated under sec. 4 of the Administrator-General and Official Trustees Act V of 1902.

Also under sec. 25 of the Administrators-General Act No. III of 1913 any private executor or administrator may, with the previous consent of the Administrator-General of the Presidency in which any of the assets of the estate in respect of which such executor or administrator has obtained probate or letters of administration are situate, transfer the assets vested in him to the Administrator-General by an instrument in writing notified in the official Gazette, *Adm.-General v. Premlal*, 22 Cal. 788 (P. C.).

An executor so discharged remains liable for anything he has done or left undone while an executor. The discharge only relieves him from the duties of his office from the date of discharge.

Appointment of Receiver.—As a general rule the Court will not appoint a receiver against an executor because his appointment as executor shows that the testator had confidence in him and the Court will give full weight to that expression of confidence and will require a very strong case to be made out for a receiver against an executor. Gross misconduct, serious mismanagement, misuse of

misapplication of the estate in his hands would be grounds justifying the appointment of receiver, *Adm.-General v. Prem Lall*, 21 Cal. 737 reversed in appeal to Privy Council, 22 Cal. 788 (P. C.); *Adm.-General v. Prem Lall*, 22 Cal. 1011; *Middleton v. Dodswell*, 13 Ves. 268. Bankruptcy or insolvency of a sole executor is also a ground for such appointment. (See *Williams on Executors*, 10th Edn., p. 1615).

302. Where probate or letters of administration in respect of any estate has or have been granted under this Act, the High Court may, on application made to it, give to the executor or administrator any general or special directions in regard to the estate or in regard to the administration thereof.

(This is sec. 264-B of the Succession Act X of 1865 and sec. 81-B of the Probate and Administration Act V of 1881).

COMMENTARY.

Under sec. 34 of the Indian Trusts Act II of 1882, a trustee may, without instituting a suit, apply by petition for direction or advice. In *Trimbak v. Narayan*, 33 Bom. 429, it was held that so long as an executor occupied the position of an executor he could not claim the benefit of sec. 34 and his only remedy was to file an administration suit. Sec. 302 now gives the right to apply for direction on petition.

After a grant is made the District Court has no powers to give directions. The power vests in the High Court by virtue of sec. 302, *Winsor v. Winsor*, 44 Bom. 682; see also, *In re Lakshmi Bai*, 12 Bom. 638; *In re Madras Dovelon Trust Fund*, 18 Mad. 443.

CHAPTER V.

Of Executors of their own Wrong.

303. A person who intermeddles with the estate of the deceased, or does any other act which belongs to the office of executor, while there is no rightful executor or administrator in existence, thereby makes himself an executor of his own wrong.

Exceptions.—(1) Intermeddling with the goods of the deceased for the purpose of preserving them or providing for his funeral or for the immediate necessities of his family or property, does not make an executor of his own wrong.

(2) Dealing in the ordinary course of business with goods of the deceased received from another does not make an executor of his own wrong.

Illustrations

(1) A uses or gives away or sells some of the goods of the deceased, or takes them to satisfy his own debt or legacy or receives payment of the debts of the deceased. He is an executor of his own wrong.

(ii) A, having been appointed agent by the deceased in his lifetime to collect his debts and sell his goods, continues to do so after he has become aware of his death. He is an executor of his own wrong in respect of acts done after he has become aware of the death of the deceased.

(iii) A sues as executor of the deceased, not being such. He is an executor of his own wrong.

(This is sec. 265 of the Succession Act X 1865).

COMMENTARY.

(See next section).

304. When a person has so acted as to become an executor of his own wrong, he is answerable to the rightful executor or administrator, or to any creditor or legatee of the deceased, to the extent of the assets which may have come to his hands after deducting payments made to the rightful executor or administrator, and payments made in due course of administration.

(This is sec. 266 of the Succession Act X 1865).

COMMENTARY.

These sections apply to Europeans, Parsis and Indian Christians. They also apply to Hindus and Muhammadans. (See p. 318).

Definition.—If one who is neither executor nor administrator intermeddles with the estate of the deceased or does any act which belongs to the office of executor, while there is no rightful executor or administrator in existence, he thereby makes himself, what is called in the law, an executor of his own wrong, or more usually, an executor *de son tort*. In order to constitute a person executor *de son tort*, there must be no rightful executor or administrator.

There is no such thing as administrator *de son tort* for the expression "executor *de son tort*" is used whether the deceased has died testate or intestate, *Khitish Chandra v. Radhika*, 35 Cal. 276; *Magaluri v. Narayana*, 3 Mad. 359.

If a legatee is in possession of a substantial portion of the property he is an executor *de son tort* with all the liabilities of an executor and universal legatee and he cannot plead want of probate or letters of administration, *Manuel v. Inana*, 31 Mad. 187. Probate is necessary to complete the title of a rightful executor and until it is actually taken out, a person intermeddling with the assets constitutes himself executor *de son tort*, *Navazbai v. Pestonji*, 21 Bom. 400.

A very slight circumstance of intermeddling is sufficient to make a person executor *de son tort*, e. g., milking the cows, taking the dog,

What acts will constitute intermeddling.

or killing a cattle, Selling the goods of the deceased, though they may be of a perishable kind, is intermeddling, *Padget v. Priest*, 2 Term Rep. 97; *Read's Case*, 5 Co. 336; *Chuni Lal v. Osmond*, 30 Cal. 1044; *Ayeshabai v. Ebrahim*, 32 Bom. 364. Demanding and recovering a debt due to the deceased or paying a debt due from the deceased while there is no rightful

executor or administrator will constitute a person executor *de son tort*, *Sharland v. Mildon*, 5 Hare, 468; *Ayeshabai v. Ebrahim*, *supra*.

But intermeddling with the object of preserving the goods of the deceased or locking them up or directing the funeral in a manner suitable to the estate and defraying the expenses of the funeral himself or out of the estate, making an inventory of his property, repairing his house, or providing for the immediate necessities of the family or property will not make a person executor *de son tort*. Also dealing in the ordinary course of business with the goods of the deceased received from another will not make a person executor *de son tort*. See exceptions to sec. 303. (Williams on Executors, 10th Edn., p. 187.)

Liability of Executor "*de son tort*".—He is liable—

- (1) To the rightful executor or administrator, or
- (2) To any creditor of the deceased, or
- (3) To any legatee under the will. He can be sued by a legatee in the absence of legal representative, *Rajah Parthasarathy v. Rajah Venkatadri*, 46 Mad. 190.

Extent of his liability. He is liable to the extent of the assets which may have come to his hands after deducting—

- (a) Payments made to rightful executor or administrator, and
- (b) Payments made in due course of administration.

His liability lasts as long as he continues dealing with the estate, *Danodur v. Dayal*, 11 Bom. L. R. 1187.

According to the English law an executor *de son tort* has all the liabilities, though none of the privileges that belong to the character of executor, *Carmichael v. Carmichael*, 2 Phill. C. C. 103. He is, however, protected in all acts not for his own benefit which a rightful executor may do and, therefore, in an action by a creditor of the deceased, if he pleads that the estate is fully administered, he shall not be charged beyond the assets which came to his hands. (Williams on Executors, 10th Edn., p. 191 *et seq.*). But if an executor *de son tort* retains assets for his own use or pays his own debt he cannot plead *plene administravit*, *Narayanasami v. Esa Abbayi*, 28 Mad. 351.

Effect of sale by an Executor "*de son tort*".—“All lawful acts which an executor *de son tort* doth are good”, *Coulter's Case*, 5 Co. 31 a.—“A legal act done by an executor *de son tort* shall bind the rightful executor and shall alter the property”, Lord Holt, in *Parker v. Kett* 1 Ld. Raym. 661. In order that the alienation or payment made by an executor *de son tort* may be binding on the rightful executor or administrator, it must be shown (and the onus will be on the alienee or the purchaser) that the executor *de son tort* really acted as executor and the party with whom he dealt had fair reason for supposing that he had authority to act as such. If this is proved, the alienation will be binding on the executor and shall alter the property, *Thomson v. Harding*, 2 L. & B. 630. (Williams on Executors, 10th Edn., pp. 195-197).

An executor *de son tort* falls within the principle, if not the letter, of the prohibition contained in sec. 53 of the Indian Trusts Act, *i. e.*, he cannot directly or indirectly buy or become a mortgagee of the property and the alienation will be voidable by the beneficiaries, *Goculdas v. Valibai*, 15 Bom. L. R. 343. He has no right to retain his own debt, *Narayana Sami v. Esa Abbayi*, 28 Mad. 351.

Hindu Law and Executor "*de son tort*".—Sections 265-266 of the Succession Act X of 1865 were not incorporated either in the Hindu Wills Act or in the Probate and Administration Act. Under the present Act, Sections 303 and 304 are made applicable to Hindus, and to Mahomedans also. In the Bill that was introduced in Council, section 302 ran as follows:—"Nothing in this Chapter shall apply when the deceased was a Hindu, Muhammadan, Buddhist, Sikh, or Jaina or an exempted person". This section was omitted in the Select Committee, see Statement of Objects and Reasons. Even before this Act the principles laid down in sections 303 and 304 were applied to Hindus and Mahomedans. See *Jogendranarain v. Emily Temple*, 2 Ind. Jur. N. S. 234; *Suddasook v. Ram Chunder*, 17 Cal. 620; *Khitish Chandra v. Radhika*, 35 Cal. 276; *Ramasami v. Veerappa*, 33 Mad. 423. Before, however, holding a Hindu or a Mahomedan liable as an executor *de son tort* it must be remembered that Hindus and Mahomedans are not required to obtain probate or letters of administration. Where, therefore, the heirs of a deceased Hindu or Mahomedan take possession of the property and administer the same and pay the debts of the deceased, they will not incur the liability to account as executors *de leur tort* but will only be liable as the heirs of the deceased, *Haji Saboo Sidick v. Ally Mahomed*, 6 Bom. L. R. 1135. In the latest Madras case of *Rajah Parthasarathy v. Rajah Venkatadri*, 46 Mad. 190, it was held that the doctrine of executor *de son tort* is applicable to Hindus on the general principles of equity and good conscience. See also, *Prosunno v. Kristo*, 4 Cal. 342.

Examples

(1) A not being an executor or administrator demands from B a debtor of the deceased the debt owing from him. B pays the debt to A. A is an executor *de son tort*.

(2) A being the servant of B sells the goods of the deceased as well after his death as before by the directions of the deceased given in his lifetime. A pays the money to B. A and B, the master and servant, are both liable as executors *de leur tort*, *Padget v. Priest*, 2 Term. R. 97.

(3) A sues as executor of B. A has not proved the will, nor has he been appointed executor. A constitutes himself executor *de son tort*. Similarly, A is being sued as executor of B. A does not plead that he is not such. A constitutes himself executor *de son tort*.

(4) A proves the will and obtains probate. B intermeddles with the estate of the deceased. B is not an executor *de son tort* but a trespasser. Where there is a rightful executor, there cannot be an executor *de son tort*.

NOTE.—The rule of English law that no liability as executors *de son tort* can arise when there is another personal representative does not apply in India. See *Narayanasami v. Esa Abbayi*, 28 Mad 351

(5) A, while there is no rightful executor or administrator, locks up the goods of the deceased for preservation, makes an inventory of his property, feeds his cattle, repairs his house, and provides for the necessaries for his children. A does not constitute himself an executor *de son tort*.

(6) A not being a rightful executor or administrator sells the goods of the deceased to B. A is executor *de son tort*, but not B, unless there is collusion between A and B, *Hill v. Curtis*, L. R. 1 Eq. 90; *Paull v. Simpson*, 9 Q. B. 365.

(7) A on the death of B pays off a debt due to C by B which A had guaranteed and removes the goods belonging to B's estate. A becomes liable as executor *de son tort*, *Narayanasami v. Esa Abbay*, 28 Mad. 351.

CHAPTER VI.

Of the Powers of an Executor or Administrator.

305. An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and, may exercise the same power for the recovery of debts as the deceased had when living.

In respect of causes of action surviving the deceased and rents due at death.

(This is sec. 267 of the Succession Act X of 1865 and sec. 88 of the Probate and Administration Act V of 1881).

COMMENTARY.

(See next section).

306. All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.

Demands and rights of action of or against deceased survive to and against executor or administrator.

Illustrations

(i) A collision takes place on a railway in consequence of some neglect or default of an official, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having brought any action. The cause of action does not survive.

(ii) A sues for divorce. A dies. The cause of action does not survive to his representative.

(This is sec. 268 of the Succession Act X of 1865 and sec. 89 of the Probate and Administration Act V of 1881).

COMMENTARY.

Survival of Right of Action.—By virtue of sec. 211 all the property of the deceased vest in the executor or administrator. Hence an executor or an administrator completely represents the estate and all the rights and liabilities of the deceased are in him and him alone. All the rights which the deceased could have exercised in his lifetime and all the liabilities to which the deceased was so

vest in the executor or administrator. These rights do not survive in favour of the heirs, *Sayad Jiaul v. Sitaram*, 36 Bom. 144. The causes of action which survive are either in contract or in tort and the liability of the executors or administrators is not personal but to the extent of the assets of the deceased which come to their hands.

Actions in Contract.—Sec. 37 of the Contract Act provides as follows:—“Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.” Therefore, on the death of a person all obligations, contracts, debts and other engagements survive to and against his executors or administrators. The right to sue for damages for breach of contract, the right to sue on a promissory note, the right to sue for debt, the right to sue on a mortgage, the right to sue for pre-emption recognised by Mahomedan Law (*Sayyad Jiaul v. Sitaram*, 36 Bom. 144) all survive. Only such contracts which are merely personal to the deceased, e.g., an action for divorce or which involve personal skill, ability or character do not survive, *Toomey v. Rama*, 17 Cal. 115; *Mohendra v. Kali Proshad*, 30 Cal. 265. If a person applies for probate and dies pending the grant, the right does not survive, *Sarat Chandra v. Nanu Mohan*, 36 Cal. 799.

Action in Tort.—“*Actio personalis moritur cum persona.*”—Generally actions in tort do not survive, the rule being that where the wrong or injury is personal to the deceased no action will lie by his legal representatives. Sec. 306 follows this rule and lays down that in the following cases the right of action does not survive.

- (1) Action for defamation.
- (2) Action for assault.
- (3) Action for other personal injuries not causing death.
- (4) Action for malicious prosecution. See *Motilal v. Harnarayan*, 47 Bom. 716 where *Krishna v. Corporation of Calcutta*, 31 Cal. 993 which lays down the contrary has been dissented from; see also, *Murugappa v. Ponnusami*, 44 Mad. 828.

Act XII of 1855.—See appendix. This Act gives to the executors or administrators of a deceased person right to sue for any wrong committed in the lifetime of such person which has occasioned pecuniary loss to his estate and for which wrong an action might have been maintained by such person, provided such wrong was committed within one year before his death and such action was brought within one year after his death. See the following cases, *Vinayak Ragunath v. G. I. P. Ry. Co.*, 7 B. H. C. R. 113; *Haridas v. Ramidas*, 13 Bom. 677.

Act XIII of 1855.—See appendix. This Act gives power to maintain an action for the benefit of the wife, husband, parent, and child of a person whose death is caused by wrongful act, neglect or default, which act, neglect or default would have entitled the party injured, if death, had not ensued, to maintain an action and recover damages. This Act is a reproduction of Statute, 9 & 10 Vict. c. 93. (Lord Campbell's Act).

See the following cases:—*Johnson v. The Madras Railway Co.*, 28 Mad. 479; *East India Ry. v. Kalidas*, 28 Cal. 401 (P. C.); *Lyell v. Ganga*, 1 All. 60;

Narayan v. The Municipal Commissioner, 16 Bom. 254; *Vinayak Raghunath v. G. I. P. Ry.*, 7 B. H. C. R. 113 (o. c. j.); *Nani Bala v. Auckland Jute Co.*, 52 Cal. 602.

307. (1) Subject to the provisions of sub-section (2), an executor or administrator has power to dispose of the property of the deceased, vested in him under section 211, either wholly or in part, in such manner as he may think fit.

Illustrations

(1) The deceased has made a specific bequest of part of his property. The executor, not having assented to the bequest, sells the subject of it. The sale is valid.

(11) The executor in the exercise of his discretion mortgages a part of the immoveable estate of the deceased. The mortgage is valid.

(2) If the deceased was a Hindu, Muhammadan, Buddhist, Sikh, or Jaina, or an exempted person, the general power conferred by sub-section (1) shall be subject to the following restrictions and conditions, namely :—

(i) The power of an executor to dispose of immoveable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order.

(ii) An administrator may not, without the previous permission of the Court by which the letters of administration were granted—

(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immoveable property for the time being vested in him under section 211, or

(b) lease any such property for a term exceeding five years.

(iii) A disposal of property by an executor or administrator in contravention of clause (i) or clause (ii), as the case may be, is voidable at the instance of any other person interested in the property.

(3) Before any probate or letters of administration is or are granted in such a case, there shall be endorsed thereon or annexed

thereto a copy of sub-section (1) and clauses (i) and (iii) of sub-section (2) or of sub-section (1) and clauses (ii) and (iii) of sub-section (2), as the case may be.

(4) A probate or letters of administration shall not be rendered invalid by reason of the endorsement or annexure required by sub-section (3) not having been made thereon or attached thereto, nor shall the absence of such an endorsement or annexure authorise an executor or administrator to act otherwise than in accordance with the provisions of this section.

[Clause (1) is sec. 269 of the Succession Act X of 1865; Clause (2) is sec. 90 of the Probate and Administration Act V of 1831].

COMMENTARY.

Power of Disposal.—

Power of Disposal of an Executor or Administrator

If the deceased was a European,
Parsi or an Indian Christian.

If the deceased was a Hindu or
a Muhammadan.

An executor or administrator has absolute power of disposal of the property of the deceased both moveable and immoveable, either wholly or in part. He can sell, mortgage, or lease the property for any number of years.

An executor or administrator has power to dispose of the property of the deceased vested in him with the following restrictions :—

(1) The executor's power to dispose of *immoveable* property vested in him is subject to any restriction that may be imposed on him by the will of the deceased, unless the Court which granted probate to him permits him to dispose of any immoveable property by an order in writing notwithstanding the restriction.

(2) An *administrator* has no power to mortgage, charge, sell, make a gift of, exchange, or otherwise alienate any *immoveable* property vested in him without previous permission of the Court.

(3) An *administrator* has no power to lease any immoveable property for a term exceeding *five years* without the previous permission of the Court.

NOTE.—A disposal of property by an executor or administrator in contravention of these provisions is *voidable* at the instance of any person interested in the property. The person interested means interested independently of the executor,

If the person is a creditor of the executor in his personal capacity and not a creditor of the estate he is not a person interested in the property, *Jagobandhu v. Dwarika*, 23 Cal. 446.

I. Executor's or Administrator's Power of Disposal under Clause (1).—This clause gives to the executor or administrator an absolute power of disposal. He can sell, mortgage or lease for any years the property of the deceased and the alienee will get a good title, *De Silva v. De Silva*, 27 Bom. 103.

There is no distinction in this respect whether the property is moveable or immoveable, *Seale v. Brown*, 1 All. 710. These powers have been conferred both on the executor and the administrator in order to enable him to discharge the duties of his office. Even one executor with or without the concurrence of his co-executors can sell the property of the deceased.

He has also the authority, whether express or implied, to mortgage by actual assignment or by equitable deposit of deeds the estate of the deceased. See ill. (ii.) to clause (1), *Scott v. Tyler*, 2 Dick 727; *M'Leod v. Drummond* 14 Ves. 360; *Mead v. Orrery*, 3 Alk. 239; *Jethabhai v. Chotalal*, 34 Bom. 209; *Seale v. Brown*, 1 All. 710 (F. B.). And he cannot be interrupted in the discharge of his office nor can the assets be followed in the hands of the alienee by a creditor or a legatee, *Whale v. Booth*, 4 T. R. 625.

An executor and an administrator has power to lease the property. (See Williams on Executors, 10th Edn., pp. 707-710). See *Jugmohandas v. Pallanjee*, 22 Bom. 1, where the power of leasing by executors and trustees is fully considered.

An executor has also the power to sell properties specifically bequeathed so long as he has not assented to the bequest. (see ill. i.), and the purchaser will get a good title unless it is proved that he had notice that there were no debts of the testator or that they had been discharged, *Ewer v. Corbet*, 2 P. Wms. 149. After assent he has no power.

The executor or administrator may even pledge the property of the deceased and the pledgee may sell the things pledged if they are not redeemed in time, *Russell v. Plaine*, 18 Beav. 21; *Cassibai v. Ransordas*, 4 Bom. 5. But if the pledge is made not for the purpose of administration but long after the administration is over, the pledge will be invalid, *Attenborough v. Solomon*, (1913) A. C. 76.

Position of the Purchaser.—It is not incumbent on the purchaser or mortgagee when dealing with an executor or administrator, to see that the moneys are properly applied. *M'Leod v. Drummond*, 17 Ves. 154. It is also not necessary for the purchaser or mortgagee to inquire whether the sale is for the administration of the estate or otherwise provided the sale, etc., is not a fraudulent disposition, *Deendra v. Adm. General*, 35 Cal. 935; *De Silva v. De Silva*, 27 Bom. 103. It is also not necessary for him to inquire whether the debts and legacies have been

or not, *Sooleman Somjee v. Rahimtua Somjee*, 6 Bom. L. R. 800. But although an executor or administrator, purporting to act as such, will confer a good title on the alienee and the alienee has no obligation to see the consideration money properly applied, yet as the executor or administrator has no right to raise money for his own purposes or otherwise than for the purpose of the performance of the duties of administration, so a disposal of the property of the deceased either by sale or mortgage for purposes foreign to the administration will be set aside as against an alienee who has notice of that purpose. Fry, J., in *Re Morgan*, 18 C. D. 93 put three such possible cases.

(i) An executor as executor borrows money ostensibly for executorship purposes on the security of the testator's assets, that is a valid transaction, *Berry v. Gibbons*, L. R. 8 Ch. 747.

(ii) A man known to be an executor borrows on the security of the assets admittedly for his own private purposes, that is invalid, *Wilson v. Moore*, 1 M. & K. 337.

(iii) An executor not known to be such borrows money for his own private purposes on the security of that which appears to be his own property but which is really the testator's property, that is an invalid transaction, *Re Morgan*, 18 C. D. 93.

In order that a transaction by an executor may be rendered invalid, it must appear that the purchaser or mortgagee participated and colluded in the breach of duty by the executor, *Whale v. Booth*, 4 T. R. 625.

(Williams on Executors, 10th Edn., pp. 694-714).

The case, however, is different if the executor is also the residuary legatee. In such a case the distinction is pointed out as follows.—“A mortgage by an executor who is also a residuary legatee to secure his private debt may be set aside even at the suit of a pecuniary legatee, but as to creditors it is different; if a reasonable time has elapsed since the death of the testator and then the executor deals with the residue as his own, the purchaser may in the absence of notice to the contrary assume that the debts have been paid or that there are other assets for payment of debts, if any, and therefore, the purchaser or mortgagee would be safe as against creditors.” (Spence's Equitable Jurisdiction, Vol. II., p. 376).

The same principles are to be followed in India and the alienee gets a good title if he has no notice, *De Silva v. De Silva*, 27 Bom. 103. If the executor is also a residuary legatee the same rules as laid down above apply, see, *Bank of Bombay v. Suleman Somji*, 33 Bom. 1 (P. C.), 35 I. A. 139; *Jagobandhu v. Dwarika*, 23 Cal. 446. But the conveyance by executors must show that the executors are conveying in their representative capacity and not as heirs. If it is not so shown on the face of the document then only the beneficial interest of the persons conveying will be transferred, *Pura Sundari v. Bijraj*, 37 Cal. 362.

As to the position of the purchaser from the heir or devisee of a Hindu, it stands on the same ground as similar question under English law according to which property *bona fide* alienated before suit cannot be followed unless it can be proved—(1) that the purchaser knew that there were debts of the ancestor or testator left unsatisfied and (2) that the heir or devisee to whom he paid the purchase money

intended to apply it otherwise than in the payment of such debts, *Greender v. Mackintosh*, 4 Cal. 897; *Ganapathi v. Sivamalai*, 36 Mad. 575.

Native Christians.—Subsequent to the passing of Act VII of 1901 which made secs. 190 and 239 of the Succession Act X of 1865 inapplicable to Native Christians, the heirs of intestate Native Christians have power to deal with their shares in the property of the deceased until grant and their transactions in respect of such shares will not be made invalid by subsequent grant, *Antony v. Makis*, 34 Mad. 395.

As regards the position of the purchaser when grant is revoked, see *ante* p. 312, sec. 297 "Consequences of Revocation."

Powers of Administrators under Limited Grants.—An administrator under a limited grant can also confer an indefeasible right in the property to a person who purchases it for value, *De Silva v. De Silva*, 27 Bom. 103. An administrator *de bonis non* has the same powers, *In the goods of Mary Hemming*, 23 Cal. 579, (see sec. 313). An administrator *durante minore etate* has the same powers as an ordinary administrator. (Sec. 314).

A married woman executrix or administratrix has also the same powers. (Sec. 315).

In what cases an Alienation by an Executor or Administrator may be Impeached.—*Fraud* and *collusion* will vitiate any transaction and, therefore, if fraud is proved the transaction may be set aside. Generally an alienation will be set aside in the following cases:—

(a) If the property is sold at a *nominal* price or at a *fraudulent undervalue*, *Scott v. Tyler*, 2 Dick. 725.

(b) Where the alienation is made by the executor for the payment of his own debt.

(c) Where the alienation is made by the executor for other private purposes of his own, *At Lead v. Drummond*, 17 Ves. 155.

(d) If a chattel is specifically bequeathed, the sale of the chattel by the executor will be set aside if it is proved that the purchaser had notice of the same and of the fact that there were no debts of the testator or that they have since been discharged, *Ewer v. Corbet*, 2 P. W. 149.

(e) If a great *length of time* has elapsed since the testator's death, it will be presumed that all the debts of the testator have been discharged, and that the alienation was for a purpose foreign to the administration of the deceased's estate, *Re Verrell's Contract*, (1903) 1 Ch. 65.

executor if the deceased Hindu was governed by the Hindu Wills Act or by the Probate and Administration Act.

III. Executors or administrator's Power of Disposal under clause (2).—

- (a) As regards *moveable* property the powers of disposal is absolute and is the same as under clause (1).
- (b) As regards *immoveable* property an executor or administrator's powers are restricted.

A Hindu executor was before the passing of the Hindu Wills Act only a manager, but as such he had certain powers over the estate and for many purposes he represented the testator. It may be that the probate did not confer any legal character but the effect of grant was to declare the person to whom it was made to be entitled to the powers of an executor, *Grish Chunder v. Broughton*, 14 Cal. 862.

He was not in the same position as an executor under an English will. The property did not vest in him; he held it merely as a manager, *Sarat Chandra v. Bhupendra Nath*, 25 Cal. 103.

Power of Sale.—Sec. 90 of the Probate and Administration Act, as amended by Act VI of 1889, sec. 14, gave an *executor* merely the ordinary powers of sale that an ordinary owner would have in so far as they were not limited by the will and as such these powers were subject to the usual rules of equity, *Shri Behari-lalji v. Bai Rajbai*, 23 Bom. 342. Clause (2) of sec. 307 is to the same effect. He can sell the property without obtaining probate, *Ganapathi v. Sivamalai*, 36 Mad. 575. The only limitation over an executor is that imposed by the will. If there is no restriction in the will, his power to dispose is not dependent on the permission of the Court and the Court has no jurisdiction in the matter, *In the goods of Nundo Lall*, 23 Cal. 908.

An *administrator* under clause (2) has no power to sell without an order of the Court. A sale by an administrator without the Court's permission is not altogether *void* but is *voidable* at the instance of the party interested in the property and a person seeking to set aside the alienation will not be allowed to do so as to entitle him to recover the property and at the same time to keep the moneys or other advantages which he has obtained. The maxim "he who seeks equity must do equity" will apply, *The Eastern Mortgage and Agency, Ltd. v. Rebati Kumar Ray*, 3 C. L. J. 260. An alienation by an administrator with the permission of the Court is valid irrespective of any existence of any legal necessity, *Kakikhya v. Hari Chavan*, 26 Cal. 607. Leave under clause (2) will only be granted if the estate has remained unadministered. If the estate has been fully administered and there are no debts or legacies to be paid leave cannot be granted to a person who is in possession as the heir of the deceased, *In the goods of Nursing Chunder Bysack*, 3 C. W. N. 635.

Power to Mortgage.—Where a will gives to an *executor* power to sell the property to pay off the debts the power includes the power to mortgage unless there be some reason to be gathered from the terms of the will that it should be excluded, *Parthasarathy v. Mukundammal*, 45 Mad. 867; *Purna Chandra v. Nobin Chandra*, 8 C. W. N. 362; *Rajani v. Ramnath*, 3 C. W. N. 483; *see contra, Kanti Chandra v. Kristo Churn*, 3 C. W. N. 515; *Tika Ram v. Deputy Commissioner*, 26 Cal. 707, 26 I. A. 97.

An *administrator* has no power to mortgage or charge any immoveable property of the deceased without an order of the Court.

Power to Borrow.—Apart from any special power given by will moneys borrowed by an executor on a promissory note for the benefit of the estate is not a charge upon the estate, *Romanath v. Kanai Lal*, 7 C. W. N. 104. The executor is personally liable on a contract to borrow and he cannot be sued as an executor so as to get execution against the assets of the testator, *Debendra v. Radhika*, 8 C. W. N. 135; *Byramji v. Heerabai*, 11 Bom. L. R. 250. The executor is personally responsible for the payment of such debts, though he is entitled to be indemnified out of the estate for such borrowing if he shows it was reasonably and properly made, *Sudhir v. Gobinda*, 45 Cal. 538.

Power to Lease.—The executors of the will of a Hindu to whom clause (2) does not apply have only such authority as the terms of the will confer. A power "to manage the estate as they may deem proper" nor a power to sell it will authorize the executors to grant a lease for 999 years or for any period exceeding 21 years, *Jaqmohandas v. Pallonjee*, 22 Bom. 1. Under clause (2) an executor of the will of a Hindu or Mahomedan has the same power to lease as an executor under clause (1) subject only to any restriction imposed by the will of the deceased.

An *administration* under clause (2) has no power to lease any immoveable property for a term exceeding five years. A lease exceeding 5 years is good between the lessor and lessee as it is not void but voidable, *Shubhadra v. Chandra Kumar*, 8 C. W. N. 54. If the party prejudicially affected thereby seeks relief the Court will assist him on equitable terms of reimbursement, *Sita Sundari v. Barada Prosad*, 28 C. W. N. 444.

Executors of the will of Mahomedans.—As to the position of an executor of the will of a Mahomedan see *Sakina Bibee v. Mahomed*, 37 Cal. 839. He is not required to prove the will. He can validly sell and convey the testator's property without taking out probate or obtaining the consent of the heirs. Under sec. 211 the property of the testator vests in him and it can be sold and conveyed under this section, *Sir Mahomed Yusuf v. Hargovandas*, 47 Bom. 231.

Who can Apply for leave and when leave granted.—Under clause (2) application for leave must be made by the executor or administrator only and not by any legatee, beneficiary or heir, *In the goods of Indra Chandra*, 23 Cal. 580; and the application should be made after the grant, *Ram Lal v. Jugoo Mohun*, 1 C. W. N. 69. Leave will only be granted for the purposes of administration of the estate; if the estate is already administered leave will be refused, *Goods of Nursing Chunder*, 3 C. W. N. 635; *Lakshmi Narain v. Nanda Rani*, 9 C. L. J. 116.

NOTE—An appeal lies from an order granting leave under clause (2) to dispose of immoveable property, *Uma Charan v. Mukhtakshi*, 28 Cal. 149; see also, *Kalimuddin v. Meharui*, 39 Cal. 563.

308. An executor or administrator may, in addition to, and not in derogation of, any other powers of expenditure lawfully exercisable by him, incur expenditure—

General powers of administration.

- (a) on such acts as may be necessary for the proper care or management of any property belonging to any estate administered by him, and

(b) with the sanction of the High Court, on such religious, charitable and other objects, and on such improvements, as may be reasonable and proper in the case of such property.

(This is sec. 269-A of the Succession Act X of 1865 and sec. 90-A of the Probate and Administration Act V of 1881).

COMMENTARY.

Power of Management.—If an executor is entrusted with the management of the property it is incumbent upon him to act with the same degree of care as a man of ordinary prudence would in his own affairs, *Lakhmichand v. Jai Kuarbai*, 29 Bom. 170. As to his power to spend moneys on the improvement of the estate, see *Ouchterlony and Ouchterlony*, 11 Mad. 360. Under clause (b) of the section an executor is now empowered with the permission of the High Court to spend a reasonable and proper sum for the improvement of the estate, *Ouchterlony and Ouchterlony*, *supra*. Clause (b) also gives power to an executor or an administrator to spend a reasonable sum of money for religious and charitable objects.

309. An executor or administrator shall not be entitled to receive or retain any commission or agency charges at a higher rate than that for the time being fixed in respect of the Administrator General by or under the Administrator General's Act, 1913.

Commission or agency charges.

(This is sec. 262 B of the Succession Act X of 1865 and sec. 90-B of the Probate and Administration Act V of 1881)

COMMENTARY.

Allowance to Executors.—An executor or administrator is entitled to all reasonable expenses incurred by him in the course of administration. But he is not entitled to any allowance for personal trouble and loss of time in the execution of his duties, even though it appears that he has benefited the estate to the prejudice of his own affairs, *Robinson v. Pett*, 3 P. Wms. 251. If a surviving partner is appointed executor he is not entitled, without express stipulation, to any allowance for carrying on the trade after the testator's death, *Burden v. Burden*, 1 Ves. & B. 170. In *Narayan v. Shajani*, 22 Cal. 14 an executor before taking out probate had stipulated for remuneration and was agreed to. He was allowed commission at the agreed rate and the agreement was not held to be void against public policy, In *Agar Mahomed v. Koolsoom Bee Bee*, 24 I. A. 196, their Lordships of the Privy Council held that if a will empowers executors to charge commission, it should be regarded as a legacy and not as a debt and as a Mahomedan cannot bequeath more than a third of his estate the commission is payable out of the bequeathable third.

This section entitles an executor or administrator to stipulate for payment of commission within the limit laid down in The Administrator General's Act III of 1913. See sec. 42. The percentage is to be calculated on the income and not on the corpus, *Lloyd v. Webb*, 24 Cal 44.

If a solicitor is appointed executor and he does professional work, he is entitled to be repaid merely such costs, charges, and expenses, as he has properly paid out of his pocket, *Moor v. Frowd*, 3 M. & Cr. 45. But if the will authorizes the executor solicitor "to charge and be paid all usual professional or other charges for any business done by him or his firm in relation to the management and administration of the estate," that will enable the solicitor to charge for any work done by him in the course of his profession or business, *Gungabai v. Bhugwandas*, 32 I. A. 142; *Clarkson v. Robinson*, (1900) 2 Ch. 722. But if the solicitor attests the will containing such a clause, he will lose the benefit provided for him, *Re Barber*, 31 C. D. 665.

If there is no clause empowering the solicitor executor to charge for professional work and the solicitor incurs costs in a suit where the solicitor acts in the suit for himself and his co executors, he shall be allowed full costs, taking care that they are not to be increased by his being one of the parties, *Cradock v. Piper*, 17 Sim. 41. But this exception does not extend to a case where a solicitor executor acts in a suit for himself alone or by his partner for himself alone, *Lyon v. Baker*, 5 De G. & Sm. 622. See also *Re Corsellis*, 34 C. P. 675 where the question of the right of a solicitor trustee to charge profit costs is fully discussed. Cotton, L. J., in his judgment thus sums up the general principle: "It is a well established rule, and one founded on sound principles, that a trustee who is a solicitor cannot as a rule make any profit as a solicitor on business which is done by himself or by the firm of which he is a member in matters relating to the estate. There is one very obvious principle which applies, namely, that the trustee must discharge his duty without making any profit out of it. If there is business which a layman cannot properly perform he may employ a solicitor to do that legal business. If it is business which a trustee in his position cannot be expected to discharge such as receiving rents, he may employ an agent to collect the rents, but if he chooses to do work, he cannot make a charge against the estate.....It is not the business of a trustee although he is a solicitor, to act as solicitor for his co-trustee."

A solicitor who is sole executor and trustee is not entitled to profit costs, although the will contains a clause empowering the solicitor to charge for professional work, if the estate turns out to be insolvent, for the clause is in effect a legacy, and being a bounty he cannot claim it as against creditors, *Re Thorley*, (1891) 2 Ch. 613.

(Williams on Executors, 10th Edn., pp. 1497-1511).

310. If any executor or administrator purchases, either directly or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold.

Purchase by executor or administrator of deceased's property.

(This is sec. 270 of the Succession Act X of 1965 and sec. 91 of the Probate and Administration Act I of 1881).

COMMENTARY.

Disabilities of Executors and Administrators.—(1) An executor who has once accepted the office of executor and acted as such cannot directly or indirectly purchase the property of the deceased until he has obtained a proper discharge from his office. The fact that the executor has not taken out probate is immaterial, *Munisami v. Maruthammal*, 34 Mad. 211. Such a purchase is regarded as a breach of trust without inquiry. But an executor who has renounced probate or has not proved the will nor has acted in any manner may purchase the property, *Mackintosh v. Barber*, 7 Moore 315; *Clark v. Clark*, 9 A. C. 733; *Barada Proshad v. Gajendra Nath*, 13 C. W. N. 557.

A purchase by an executor or administrator is always looked at with suspicion even if he pays a fair value, *Nugent v. Nugent*, (1908) 1 Ch. 546. The transaction is not void but voidable and the slightest circumstance giving rise to suspicion will be enough to set it aside, *Hasanali v. Esmailji*, 9 Bom. L. R. 606; *Vaughan v. Haseltine*, 1 All. 753; and in this respect an executor *de son tort* stands on the same footing, *Gokuldas v. Valibai*, 15 Bom. L. R. 343.

(2) An executor who has once accepted the office is also estopped from setting up an adverse title to the property of the deceased. In order to enable him to do so he must obtain first a proper discharge, *Srinivasa v. Venkatavarada*, 34 Mad. 257, 38 I. A. 129; *Munisami v. Maruthammal*, 34 Mad. 211.

(3) An executor has also ordinarily no power to make a reference to arbitration with the avowed purpose that the terms of the will may be modified. Questions of law including questions of construction may be referred to arbitration but they cannot add or alter the will, *Soudamini v. Gopal Chandra*, 19 C. W. N. 948.

Where the executor or administrator submits in broad terms, to pay whatever shall be awarded and the arbitrator awards that he shall pay a certain sum, he is personally bound to carry out the award, whether he has assets or not, *Pearson v. Henry*, 5 Term. Rep. 7. If the executor or administrator wants to exonerate himself from personal responsibility he must, before submission, signify that he will be responsible only to the extent of the assets of the deceased in his hands and no more, whatever the award of the arbitrator may be. (Williams on Executors, 10th Edn., pp. 1424-1426).

(4) An executor has no power to compromise. But if he does so the compromise must be *bona fide* and in the interest of the estate, *Chidambara v. Krishnasami*, 39 Mad. 365.

311. When there are several executors or administrators, the

Powers of several executors or administrators exercisable by one.

powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will or taken out administration.

Illustrations.

- (f) One of several executors has power to release a debt due to the deceased.
- (i) One has power to surrender a lease,

(iii) One has power to sell the property of the deceased whether moveable or immoveable.

(iv) One has power to assent to a legacy.

(v) One has power to endorse a promissory note payable to the deceased.

(vi) The will appoints A, B, C and D to be executors, and directs that two of them shall be a quorum. No act can be done by a single executor.

(This is sec. 271 of the Succession Act X of 1865 and sec. 92 of the Probate and Administration Act V of 1881).

COMMENTARY.

This section applies only to cases where probate is compulsory, *Chidambara v. Krishnasami*, 39 Mad. 365.

What one of several Co-executors or Co-administrators can do.—Co-executors, however numerous, are regarded in law as an individual person and consequently when several executors prove the will the acts of any one of them in respect of the administration are deemed to be acts of all unless the testator directs that all his executors shall act jointly; where there is no such direction they have all a joint and entire authority over the whole property, *Padmanabha v. Williams*, 23 Mad. 239. Where a testator appoints several executors and directs that they should act jointly and if only one executor obtains probate, others renouncing or refusing, the proving executor can exercise the powers alone, *Satya Prashad v. Motilal*, 27 Cal. 683.

One of several executors may—

- (1) Release a debt, *Jacomb v. Harwood*, 2 Ves. Sen. 267. (Ill i.).
- (2) Settle an account with a person accountable to the estate and in the absence of fraud it will be binding on the other executors, *Smith v. Everett*, 27 Beav. 446.
- (3) Surrender a lease. (Ill. ii.).
- (4) Sell the property of the deceased, moveable or immoveable. (Ill. iii.).
- (5) Give a valid receipt, *Charlton Durham*, 4 Ch. 433.
- (6) Endorse a promissory note. (Ill. v.).
- (7) An acknowledgment by one executor is sufficient to prevent limitation, *Re Macdonald*, (1897) 2 Ch. 181.
- (8) Assent to a legacy, and his own assent to his own legacy will be sufficient, *Townson v. Tickell*, 3 B. & A. 31. (Ill. iv.).

NOTE.—One of several administrators stands on the same ground as one of several executors, *Willand v. Fenn*, 2 Ves. Sen. 267; *Jacomb v. Harwood*, 2 Ves. Sen. 267.

What one of several Co-executors or Co-administrators cannot do.—

(1) One of several co-executors cannot bind the others by his contracts, *Turner v. Hardey*, 9 M. & W. 770.

(2) One of several co-executors cannot file a suit. They must all join in filing suits. If any of them refuses, he may be made a defendant to the suit, *Smith v. Smith*, Yelv. 130. But if one of several executors has alone proved the will, he m

sue without making the other executors parties. If all have proved the will, but only one of the executors files a suit, the defendant may apply to the Court that the other executors be made parties to the suit.

(3) Generally one executor cannot sue or be sued by his co-executor.

(Williams on Executors, 10th Edn., pp. 715-727).

312. Upon the death of one or more of several executors or administrators, in the absence of any direction to the contrary in the will or grant of letters of administration, all the powers of the office become vested in the survivors or survivor.

Survival of powers on death of one of several executors or administrators.

(This is sec. 272 of the Succession Act X of 1865 and sec. 93 of the Probate and Administration Act V of 1881).

COMMENTARY.

The powers of an executor survive to his co-executors when there are several executors, *Prasad v. Motilal*, 27 Cal. 683; *Amrita v. Surnomoyi*, 24 Cal. 589.

313. The administrator of effects unadministered has, with respect to such effects, the same powers as the original executor or administrator.

Powers of administrator of effects unadministered.

(This is sec. 273 of the Succession Act X of 1865 and sec. 94 of the Probate and Administration Act V of 1881).

314. An administrator during minority has all the powers of an ordinary administrator.

Powers of administrator during minority.

(This is sec. 274 of the Succession Act X of 1865 and sec. 95 of the Probate and Administration Act V of 1881).

315. When a grant of probate or letters of administration has been made to a married woman, she has all the powers of an ordinary executor or administrator.

Powers of married executrix or administratrix.

(This is sec. 275 of the Succession Act X of 1865 and sec. 96 of the Probate and Administration Act V of 1881).

CHAPTER VII.

Of the Duties of an Executor or Administrator.

316. It is the duty of an executor to provide funds for the performance of the necessary funeral ceremonies of the deceased in a manner suitable to his condition, if he has left property sufficient for the purpose.

As to deceased's funeral

(This is sec. 276 of the Succession Act X of 1865 with the following alteration, viz., instead of the words "to perform the funeral of the deceased" the words "to provide funds for the performance of the necessary funeral ceremonies" are inserted. This is in accordance with sec. 97 of the Probate and Administration Act V of 1881).

COMMENTARY.

The section mentions only *executor*; but it is submitted the same would apply to an *administrator*.

A man cannot dispose of his body by his will and after death the custody and possession of the body belong to his executors until it is buried, *Williams v. Williams*, 20 C. D. 659. But it is the duty of the executor to give effect to the wishes of the deceased and if the deceased has left no directions, the executor must dispose of the body in the usual manner prevailing in the community and the caste to which the deceased belonged, *e. g.*, a Christian is entitled to a Christian burial, a Hindu to a Hindu burial. The executor would not be warranted, to gratify his own fancy, without the deceased's sanction, in cremating the body.

(*Williams on Executors*, 10th Edn., p. 737.)

The deceased should be buried in a manner suitable to the estate he leaves behind and funeral expenses according to the degree and quality of the deceased are allowed, *Mullick v. Mullick*, 1 Knapp. 245. The executor or administrator will not be justified in incurring extravagant expenses and if the estate is insolvent no more shall be allowed than those which are absolutely necessary, *Hancock v. Podmore*, 1 B. & Ad. 260. No precise sum can be fixed, it must vary in every case according to the station in life of the deceased and the community to which he belonged. Where funeral and testamentary expenses are directed to be paid out of a legacy and not out of the general estate of the testator such expenses are to be paid out of the legacy, *Camani v. Administrator-General of Madras*, 29 Mad. 290.

317. (1) An executor or administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the Court which granted the probate or letters may appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character; and shall in like manner, within one year from the grant or within such further time as the said Court may appoint, exhibit an account of the estate, showing the assets which have come to his hands and the manner in which they have been applied or disposed of.

(2) The High Court may prescribe the form in which an inventory or account under this section is to be exhibited.

(3) If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, inten

tionally omits to comply with the requisition, he shall be deemed to have committed an offence under section 176 of the Indian Penal Code.

(4) The exhibition of an intentionally false inventory or account under this section shall be deemed to be an offence under section 193 of that Code.

(This is sec. 277 of the Succession Act X of 1865 and sec. 98 of the Probate and Administration Act V of 1881).

COMMENTARY.

(See next section.)

318. In all cases where a grant has been made of probate or letters of administration intended to have effect throughout the whole of British India, the executor or administrator shall include in the inventory of the effects of the deceased all his moveable and immoveable property situate in British India, and the value of such property situate in each province shall be separately stated in such inventory, and the probate or letters of administration shall be chargeable with a fee corresponding to the entire amount or value of the property affected thereby wheresoever situate within British India.

(This is sec. 277-A of the Succession Act X of 1865 and sec. 99 of the Probate and Administration Act V of 1881).

COMMENTARY.

Contents of Inventory.—The inventory must contain a full and true estimate of:—

- (a) All the property, both moveable and immoveable, in the possession of such executor or administrator, and, when the grant is made having effect throughout the whole of British India, all the moveable and immoveable property in British India and the value of such property situate in each province.
- (b) All the credits of the deceased, and
- (c) All the debts owing by any person to which the executor or administrator is entitled in that character. A mere list of the property of the deceased is not an inventory, *Bhubaneswari v. Collector of Gaya*, 41 Cal. 556, 40 I. A. 236.

Account.—An executor or administrator is bound to keep clear and regular accounts and he is required to file his account within one year from the date of grant. The account must show the assets come to his hands and the manner in which they have been applied. The word "assets" means things available for distribution and includes goods, chattels, etc., of which the deceased was in possession at the time of his death or which have come to the hands of the executor or administrator. As regards goods and chattels in action or in possibility they are not

considered assets until recovered; debts due to the deceased are not assets; see, however, *Khushrobbhai v. Hormazsha*, 11 Bom. 727; see also, *Omrita Nath v. Adm.-General*, 25 Cal. 54 at 58; *In re Courjon*, 25 Cal. 65 at 73; *Watkins v. Sarat Chunder*, 31 Cal. 572 at 582; *Ganoda Sundary v. Nalini Ranjan*, 36 Cal. 28.

In practice, however, neither an executor nor an administrator exhibits an inventory or files any account, until he has been cited to do so by any person interested in the estate. But when once he is called upon to file his account it is his duty to do so without compelling the party calling upon him to take out an order to compel him to do so, *In re Jetha Padamsi*, 7 Bom. L. R. 451. An executor who has not proved the will has a sufficient interest to call upon the other executors who have proved to exhibit an inventory and render an account, *Jehanji R. Divecha v. Bai Kukibai*, 27 Bom. 281.

An attorney who takes administration in the name of another may be compelled to exhibit an inventory and account. An administrator *durante minore ætate* may be compelled to give an inventory. (Williams on Executors, 10th Edn., pp. 741-749).

The inventory and account required to be filed under this section is only one inventory and one account and not periodically every year, *Chandra v. Prasanna*, 48 Cal. 1051; *Mohesh Chandra v. Biswa Nath*, 25 Cal. 250. Under this section the Court has no power to institute an inquiry as to whether the inventory and account filed are correct. All that the Court has to do is to see that the inventory and account *prima facie* satisfy the requirements of the section. If the account is *prima facie* proper no order can be made to bring in a revised account. But if the account is materially untrue the Judge may take action under clause (4) of sec. 317, *Sarat Sundari v. Uma Prasad*, 31 Cal. 628.

319. The executor or administrator shall collect, with reasonable diligence, the property of the deceased and the debts that were due to him at the time of his death.

As to property of, and debts owing to, deceased.

(This is sec. 278 of the Succession Act X of 1865 and sec. 100 of the Probate and Administration Act V of 1881).

COMMENTARY.

Collecting the Property.—It is the duty of the executor or administrator to collect with reasonable diligence the property of the deceased and the debts due to him. If the property is invested in hazardous securities, it is the duty of the executor or administrator to convert and invest it in authorized securities. In case where the residue is given for life with remainders over it is the further duty of the executor in the absence of special provision to see that the fund is properly invested. (Sec. 345). Where any particular securities are indicated by the testator the executors will not be justified in going beyond such mode of investment from any belief well founded or otherwise of thereby benefitting the *cestui que trustent*. In the absence of any power expressly given by the will, it is the general duty of an executor to invest in the authorized securities and the period from the testator's death within which the conversion should be made is twelve months. But if the will provides that the legatee should enjoy the residue *in specie* so as to exempt the executors from their duty of conversion the executors shall not be liable, *M. A. De Soora v. Ignacio*,

B. H. C. R. 184 at 189. (See further, on the duty of executors for conversion, sec. 345 to 347 and commentary).

It is also the duty of the executor to take steps to collect all the debts due to the deceased. If by unduly delaying to file a suit the executor or administrator enables the debtor of the deceased to avail himself of the benefit of the Limitation Act, the executor or administrator will be personally liable. (III. ii., sec. 369).

If the executor is himself the debtor, the debt due from him is considered as an asset in his hands, *Administrator-General v. Kristo*, 31 Cal. 519. No limitation runs as long as he remains executor or dies whichever first happens, *Yakub v. Bai Rahimatbai*, 10 Bom. L. R. 346; *Hossainara v. Rahimannessa*, 38 Cal. 342.

320. Funeral expenses to a reasonable amount, according to the degree and quality of the deceased, and death-bed charges, including fees for medical attendance, and board and lodging for one month previous to his death, shall be paid before all debts.

Expenses to be paid before all debts.

(This is sec. 279 of the Succession Act X of 1865 and sec. 101 of the Probate and Administration Act V of 1881).

321. The expenses of obtaining probate or letters of administration including the costs incurred for or in respect of any judicial proceedings that may be necessary for administering the estate, shall be paid next after the funeral expenses and death-bed charges.

Expenses to be paid next after such expenses.

(This is sec. 280 of the Succession Act X of 1865 and sec. 102 of the Probate and Administration Act V of 1881).

322. Wages due for services rendered to the deceased within three months next preceding his death by any labourer, artizan or domestic servant shall next be paid, and then the other debts of the deceased according to their respective priorities (if any).

Wages for certain services to be next paid, and then other debts

(This is sec. 281 of the Succession Act X of 1865 with the addition of the words "according to their respective priorities" at the end of the section. It is in accordance with sec. 103 of the Probate and Administration Act V of 1881).

323. Save as aforesaid, no creditor shall have a right of priority over another; but the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably as far as the assets of the deceased will extend.

Save as aforesaid, all debts to be paid equally and rateably.

(This is sec. 282 of the Succession Act X of 1865 with the omission of the words "by reason that his debt is secured by an instrument under seal or on any other account." It is in accordance with sec. 104 of the Probate and Administration Act V of 1881).

COMMENTARY.

Application of the Estate.—

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|-------------------|---|---|
| To be paid first. | { | (a) Funeral expenses to a reasonable amount according to the degree and quality of the deceased. |
| | | (b) Death-bed charges including medical attendance. |
| | | (c) Board and lodging for one month previous to death. |
| Then | | (d) Expenses of obtaining probate or letters of administration including costs of any suit or proceedings for that purpose.—
“Executorship Expenses” or testamentary expenses are the expenses incident to the proper performance of the duty of an executor and includes besides the probate expenses the costs of obtaining the advice of solicitors or opinion of counsel as to the distribution of the estate. |
| Then | | (e) Wages of labourers, artisans, and domestic servants of the deceased for <i>three months</i> immediately preceding the death. |
| Then | | (f) The other debts of the deceased. |
| Then | | (g) The specific legacies. |
| Then | | (h) Demonstrative legacies. |
| Then | | (i) General legacies. |

Payment of Debts.—The executor or administrator must pay all the debts of the deceased *including his own* equally and rateably so far as the assets of the deceased will extend and no creditor whether special or simple shall have any priority over another on any account except as above. Debts of every description must be paid before any legacy. It is only when the assets are insufficient to pay all the creditors in full that sec. 323 comes into operation. If the assets are sufficient a creditor is entitled to be paid in full at once, *Omrita Nath v. Adm.-General*, 25 Cal. 54; *Remfry v. De Penning*, 10 Cal. 929. An executor may even pay a barred debt, *Tillakchand v. Sitamal*, 10 B. H. C. R. 206; *Mohesh Lal v. Busunt Kumaree*, 6 Cal. 340; *Adm.-General v. Hawkins*, 1 Mad. 267.

If an administrator pays such debts as he knows of otherwise than equally and rateably he is personally liable for any loss to a creditor of the deceased by improper distribution of the estate, *Asiatic Banking Corporation v. Amador Viegas*, 8 B. H. C. R. 20. (*o. c. j.*).

In England the law is different. Debts are classified under different heads and their order of payment is specified. Debts of superior degree must be paid before debts of inferior degree. *Hinde Palmer's Act* abolished the distinction prevailing between specialty and simple contract debts and now the bond debts and other debts by instruments rank *pari passu* with simple contract debts. Section 323

re-enactment of the principle laid down in the English Statute. Also according to the English law the executor has this privilege that among creditors of equal degree he may pay one in preference to another, *Lyttleton v. Cross*, 3 B. & C. 317; see also, *In re Jones, Peak v. Jones*, (1914) 1 Ch. 742. Not so under section 323. He must pay all the debts *equally and rateably* and without any preference.

Sec. 323 does not affect the right of a decree-holder. A decree-holder is entitled to have the amount of the decree paid out of the assets of the deceased in the hands of the legal representatives which have not yet been duly disposed of. The legal representative is bound to pay to the decree-holder the *full* amount of the decree, though there may be other creditors of the deceased, and the assets may not be sufficient to pay them all in full, unless the legal representative say there are no assets or insufficient assets, *Venkatarangayan v. Krishnasami*, 22 Mad. 194. See also, *Bai Meherbai v. Moganchand*, 29 Bom. 96; *Nilkomul v. Reed*, 12 B. L. R. a-c. 287.

Of the Right of Retainer by Executor or Administrator.—According to the English law an executor or administrator has a right to retain his own debt due to him from the deceased in preference to other creditors of equal degree with him, *Woodward v. Lord Darcy*, Plowd. 185. This remedy arises from the mere operation of law that it were absurd and incongruous that he should sue himself. Therefore, he may appropriate a sufficient part of the assets in satisfaction of his own debt. But he is not entitled to retain his own debt against a debt of a higher degree and the right only extends to funds actually or constructively in his possession. After a receiver is appointed in an administration suit, if assets are collected by the receiver, there is no right of retainer by the executor but he retains his right over the moneys collected by himself before the appointment of receiver, *Taaffe v. Taaffe*, (1902), 1 Ir. R. 148, *Re Harrison*, 32 C. D. 395. An executor or administrator may retain a debt due to himself even though the debt be barred by limitation. But an executor or administrator cannot retain a debt due to himself if it is such that he cannot enforce, *Stahlschmidt v. Lett*, 1 Sm. & G. 415. (See Williams on Executors, 10th Edn., pp. 785-798).

Under sec. 323 of this Act the executor has no right to retain his own debt in preference to the debt of other creditors. He must pay all the debts *including his own* equally and rateably. But it would appear that if the assets are sufficient to pay all the debts in full, an executor may retain his own debt even though it be barred by limitation, *Mohesh Lal v. Busunt Kumaree*, 6 Cal. 340. See also *Peary Mohun v. Narendra*, 37 Cal. 229 (P. C.). The right of retainer does not give a charge on the property not in the possession of the executor, *Chidambara v. Krishnasami*, 39 Mad. 365 at 369.

Application of moveable property to payment of debts where domicile not in British India.

324. (1) If the domicile of the deceased was not in British India, the application of his moveable property to the payment of his debts is to be regulated by the law of British India.

(2) No creditor who has received payment of a part of his debt by virtue of sub-section (1) shall be entitled to share in the

proceeds of the immoveable estate of the deceased unless he brings such payment into account for the benefit of the other creditors.

(3) This section shall not apply where the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person.

Illustration.

A dies, having his domicile in a country where instruments under seal have priority over instruments not under seal leaving moveable property to the value of 5,000 rupees, and immoveable property to the value of 10,000 rupees, debts on instruments under seal to the amount of 10,000 rupees, and debts on instruments not under seal to the same amount. The creditors holding instruments under seal receive half of their debts out of the proceeds of the moveable estate. The proceeds of the immoveable estate are to be applied in payment of the debts on instruments not under seal until one-half of such debts has been discharged. This will leave 5,000 rupees which are to be distributed rateably amongst all the creditors without distinction, in proportion to the amount which may remain due to them.

[Clause (1) is sec. 283 of the Succession Act X of 1865. Clause (2) is sec. 284 of the Succession Act X of 1865. Clause (3) is new]

Debts to be paid before legacies.

325. Debts of every description must be paid before any legacy.

[This is sec. 285 of the Succession Act X of 1865 and sec. 105 of the Probate and Administration Act V of 1881].

COMMENTARY.

See the following case, *Ambica v. Mukta*, 2 C. L. J. 138 ; where it was held that a mere direction in a will to pay all debts does not create a charge on the estate.

326. If the estate of the deceased is subject to any contingent liabilities, an executor or administrator is not bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due.

Executor or administrator not bound to pay legacies without indemnity

[This is sec. 286 of the Succession Act X of 1865 and sec. 106 of the Probate and Administration Act V of 1881].

COMMENTARY.

A liability to pay call is a contingent liability within the meaning of this section and the executor or administrator must make arrangement for payment of future calls before distributing the estate, *Asiatic Banking Corporation v. Amador Viegas*, 8 B. H. C. R. 20 (o. c. j.), 2 M. L. J. 182.

327. If the assets, after payment of debts, necessary expenses and specific legacies, are not sufficient to pay all the general legacies in full, the latter shall abate or be diminished in equal proportions, and, in the absence of any direction to the contrary in the will, the exe

Abatement of general legacies

has no right to pay one legatee in preference to another, or to retain any money on account of a legacy to himself or to any person for whom he is a trustee.

(This is sec. 287 of the Succession Act X of 1865 with the addition of the words "in the absence of any direction to the contrary in the will." It is in accordance with sec. 107 of the Probate and Administration Act V of 1881).

COMMENTARY.

After the payment of debts, the legacies are to be paid and the order for payment of legacies is:—

- (a) Specific legacies ;
- (b) Demonstrative legacies and
- (c) General legacies.

If the estate is not sufficient to pay the legacies the General legacies abate *pro rata*. Specific legacies as a rule do not abate but they are subject to ademption. Demonstrative legacies abate.

Abatement of General Legacies.—The abatement must take place among all the general legatees in equal proportions. There is no preference in payment among general legatees even if the executor himself is the legatee. It must, however, be borne in mind that before there can be an abatement, the whole of the residuary estate of the testator must be exhausted. A residuary legatee has no right to call upon particular general legatees to abate and until the residue is exhausted those legatees cannot be obliged to contribute anything out of their bequest.

A legacy for life and an annuity shall be treated as general legacies for the purpose of abatement.

According to the English authorities the general rule is that there should be no preference in payment of general legacies when the legatees are all volunteers. They all abate proportionately. But if there is any valuable consideration for the testamentary gift, *e. g.*, when the legacy is given in satisfaction of a debt owing to the legatee or of the relinquishment of any right or interest such legacy will be entitled to a preference of payment over the other general legacies which are mere bounties. It is, however, requisite that the right or interest should be subsisting at the testator's death, *Burridge v. Bradyl*, 1 P. Wms. 127; *Heath v. Dendy*, 1 Russ. Ch. C. 543; *Davies v. Bush*, 1 Younge, 341; *Blower v. Morret*, 2 Ves. Sen. 422. (Williams on Executors, 10th Edn., pp. 1093-1094). There is of course no privilege from abatement merely on the ground that the legatee is the wife or a child of the testator, *Blower v. Morret*, 2 Ves. Sen. 420. But if the testator manifests his intention to give one general legatee a priority to the others that intention must be carried into effect, *Lewin v. Lewin*, 2 Ves. Sen. 417.

Example.

A testator provided that his friend A should have a legacy and subject to the said legacy he bequeathed a legacy of Rs. 1,000 to each of his grandchildren. The estate was insufficient to pay all the legacies in full and A claimed priority. Held all the legacies including A's should abate, *Ball v. Ball*, 27 Bom. L. R. 564.

Non-abatement of specific legacy when assets sufficient to pay debts.

328. Where there is a specific legacy, and the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement.

(This is sec 238 of the Succession Act X of 1865 and sec 108 of the Probate and Administration Act V of 1881).

COMMENTARY.

Abatement of Specific Legacies.—So long as the assets of the testator are sufficient to pay the debts and necessary expenses it is the duty of the executor to deliver the thing specifically bequeathed to the legatee without any abatement. But when the assets are insufficient to pay all the debts and the specific legacies, then the specific legatees must abate in proportion to their respective amounts.

329. Where there is a demonstrative legacy, and the assets are sufficient for the payment of debts and necessary expenses, the legatee has a preferential claim for payment of his legacy out of the fund from which the legacy is directed to be paid until such fund is exhausted and if, after the fund is exhausted,

Right under demonstrative legacy when assets sufficient to pay debts and necessary expenses

part of the legacy still remains unpaid, he is entitled to rank for the remainder against the general assets as for a legacy of the amount of such unpaid remainder.

(This is sec. 25B of the Succession Act X of 1865 and sec. 109 of the Probate and Administration Act V of 1881).

COMMENTARY.

Abatement of Demonstrative Legacies.—Demonstrative legacies are not liable to abate so long as the fund out of which they are directed to be paid is sufficient to pay such legacies. But when the fund is exhausted and the legacies become payable out of the general assets, such legacies are liable to abate with the general legacies on a deficiency of assets, (section 151), unless there is a direction to the contrary, *Chinnam v Tadikonda*, 29 Mad. 155; see *Suleman v. Dorab Ali Khan*, 8 Cal. 1 (P. C.); *Sahib Mirza v. Umda Khanam*, 19 Cal 444.

330. If the assets are not sufficient to answer the debts and the specific legacies, an abatement shall be made from the latter rateably in proportion to their respective amounts.

Rateable abatement of specific legacies

Illustration.

A has bequeathed to B a diamond ring valued at 500 rupees, and to C a horse, valued at 1,000 rupees. It is found necessary to sell all the effects of the testator; and his assets, after payment of debts, are only 1,000 rupees. Of this sum rupees 333-5-4 are to be paid to B, and rupees 666-10-8 to C.

(This is sec 260 of the Succession Act X of 1865 and sec. 110 of the Probate and Administration Act V of 1881).

331. For the purpose of abatement, a legacy for life, a sum appropriated by the will to produce an annuity, and the value of an annuity when no sum has been appropriated to produce it, shall be treated as general legacies.

Legacies treated as general for purpose of abatement.

(This is sec. 291 of the Succession Act X of 1865 and sec. 111 of the Probate and Administration Act V of 1881).

COMMENTARY.

See *Jairam v. Kuverbai*, 9 Bom. 491; *Bai Bhicaji v. Bai Dinbai*, 13 Bom. L. R. 319.

CHAPTER VIII.

Of Assent to a Legacy by Executor or Administrator.

332. The assent of the executor or administrator is necessary to complete a legatee's title to his legacy.

Assent necessary to complete legatee's title.

Illustrations.

(1) A by his will bequeaths to B his Government paper which is in deposit with the Imperial Bank of India. The Bank has no authority to deliver the securities, nor B a right to take possession of them, without the assent of the executor.

(2) A by his will has bequeathed to C his house in Calcutta in the tenancy of B. C is not entitled to receive the rents without the assent of the executor or administrator.

(This is sec. 292 of the Succession Act X of 1865 with the addition of the words "or administrator". It is in accordance with secs 112 and 148 of the Probate and Administration Act V of 1881).

COMMENTARY.

Every legatee, whether general or specific and whether of moveable or of immoveable property, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect. The legatee, of course, has an inchoate right to the legacy before such assent and he can assign or transfer the legacy to any one he likes and in the event of his death before the assent is given it is transmissible to his representatives, *Lakshmamma v. Ratnamma*, 38 Mad. 474. Where immoveable property was left to the legatee and the legatee mortgaged it before obtaining the consent of the executor it was held that the mortgage was good, *Khagendra v. Khetra Nath*, 50 Cal. 171. But as a protection to the executor the law ordains that every legatee whether general or specific must obtain the executor's assent before his title can be complete and perfect. When once an assent is given it shall have relation back to the time of the testator's death. (See ill. i., sec. 336). The legatee has no right to take possession of his legacy without the assent of the executor and if he does take possession, the executor may maintain an action for trespass, *Hasanalli v. Popatlal*, 14 Bom. L. R. 782. In a suit for a legacy the plaintiff must show either there are sufficient assets or that the executor has assented, *Okhoy v. Koylash*, 17 Cal. 387; see also *Chimanrao v. Rambhau*, 4 Bom. L. R. 508.

333. (1) The assent of the executor or administrator to a specific bequest shall be sufficient to divest his interest as executor or administrator therein, and to transfer the subject of the bequest to the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way.

Effect of executor's assent to specific legacy.

(2) This assent may be verbal, and it may be either express or implied from the conduct of the executor or administrator.

Illustrations

(i) A horse is bequeathed. The executor requests the legatee to dispose of it, or a third party proposes to purchase the horse from the executor, and he directs him to apply to the legatee. Assent to the legacy is implied.

(ii) The interest of a fund is directed by the will to be applied for the maintenance of the legatee during his minority. The executor commences so to apply it. This is an assent to the whole of the bequest.

(iii) A bequest is made of a fund to A and after him to B. The executor pays the interest of the fund to A. This is an implied assent to the bequest to B.

(iv) Executors die after paying all the debts of the testator, but before satisfaction of specific legacies. Assent to the legacies may be presumed.

(v) A person to whom a specific article has been bequeathed takes possession of it and retains it without any objection on the part of the executor. His assent may be presumed.

(This is *sec 293 of the Succession Act X of 1865 with the addition of the words "or administrator."* It is in accordance with *secs 113 & 118 of the Probate and Administration Act V of 1881*.)

COMMENTARY.

(See next section.)

334. The assent of an executor or administrator to a legacy may be conditional, and if the condition is one which he has a right to enforce, and it is not performed, there is no assent.

Conditional assent.

Illustrations.

(i) A bequeaths to B his lands of Sultanpur, which at the date of the will, and at the death of A, were subject to a mortgage for 10,000 rupees. The executor assents to the bequest, on condition that B shall within a limited time pay the amount due on the mortgage at the testator's death. The amount is not paid. There is no assent.

(ii) The executor assents to a bequest on condition that the legatee shall pay him a sum of money. The payment is not made. The assent is nevertheless valid.

(This is *sec 294 of the Succession Act X of 1865 with the addition of the words "or administrator."* It is in accordance with *secs 113 & 118 of the Probate and Administration Act V of 1881*.)

COMMENTARY.

Nature of Assent.—The assent may be verbal and it may either be express or implied from the conduct of the executor. But the act or expressions must be sufficient to impart an assent should be unambiguous. In certain cases the

of the executor may be *presumed* upon the principle that in the absence of evidence the executors shall be taken to have acted in conformity with their duty, as when executors die after the debts are paid but before the legacies are satisfied, *Cray v. Willis*, 2 P. Wms. 531, (ill. iv.).

The assent of the executor may be *conditional*, *e. g.*, if he tells the legatee that he will pay the legacy provided the assets are sufficient to answer all demands and if the condition is not performed there will be no assent. But if the condition is such as the executor had no right to impose, *e. g.*, where the executor assents on condition that the legatee shall pay him a sum of money, the condition would be regarded as void and the assent would be considered absolute.

Effect of Assent.—If the executor once assent to a specific bequest it will be sufficient to divest his interest therein and to transfer the subject of the bequest to the legatee, and he is not competent to deal further with the property, *Marie Penheiro v. Jotindra*, 28 C. L. J. 141. The legatee may then sue the executor to recover it. Generally the assent once given can never be retracted afterwards, especially so in the case of a specific legacy, *Dix v. Burford*, 19 Beav. 409. But in case of general legacies if the assent is not followed by payment and afterwards debts appear of which the executor had no notice the assent may be retracted, if it is not attended with injury to third persons, *e. g.*, a *bona fide* purchaser from the legatee. If the assent is completed by payment it can never be retracted and if unknown debts appear the executor's remedy is to compel the legatee to refund. Assent when given will vest the legacy in the legatee as from the date of the death of the testator. (See sec. 336).

Examples.

(1) A directs his executor to forgive a debt due to him from B. The assent of the executor is necessary to give effect to the testator's intention, *Att.-Gen. v. Holbrook*, 12 Price, 407.

(2) A bequeaths a certain legacy to B and appoints C his executor. C pays all the debts of A but dies before the legacy to B is satisfied. B is entitled to the legacy. In this case the assent is presumed because the executor shall be taken to have acted in conformity with his duty, *Cray v. Willis*, 2 P. Wms. 531.

(3) A bequeaths his horse to B and appoints C his executor. B takes possession of the horse and continues to use it for a considerable time without any complaint by C. The assent to the bequest is presumed, *Cole v. Miles*, 10 Hare, 179.

(4) A bequeaths his house to B whom he also appoints his executor. B repairs the house at his own expense. This is a sufficient assent to the bequest, *Cheyney v. Smith* 1 Leon. 216.

335. (1) When the executor or administrator is a legatee, his assent to his own legacy is necessary to complete his title to it, in the same way as it is required when the bequest is to another person, and his assent may, in like manner, be expressed or implied.

Assent of executor to his own legacy.

(2) Assent shall be implied if in his manner of administering the property he does any act which is referable to his character of legatee and is not referable to his character of executor or administrator.

Illustration.

An executor takes the rent of a house or the interest of Government securities bequeathed to him, and applies it to his own use. This is assent.

(This is sec 295 of the Succession Act X of 1865 with the addition of the words " or administrator." It is in accordance with secs. 115 & 143 of the Probate and Administration Act V of 1881).

COMMENTARY.

By whom Assent may be given—The assent must be given by the executor. If there are several executors the assent by one of the executors is sufficient. (Ill. iv., sec. 311). An executor may give assent before proving the will. When the executor himself is a legatee his assent to his own legacy is necessary, and his assent to his own legacy may be express or implied. If the executor in his manner of administering the estate does any act which is referable to his character of legatee and is not referable to his character of executor his assent shall be implied. If an executor legatee renounce probate, his assent to his own legacy will be ineffectual. In the case of a legacy to executors in trust for certain purposes their assent to it will make them trustees, *Dix v. Burford*, 19 Beav 409. It is also essential for an executor to prove the will or otherwise manifest his intention to act before he can claim the legacy, *Prosono Coamar v. Adm.-General*, 15 Cal. 83.

Effect of executor's assent.

336. The assent of the executor or administrator to a legacy gives effect to it from the death of the testator.

Illustrations.

(i) A legatee sells his legacy before it is assented to by the executor. The executor's subsequent assent operates for the benefit of the purchaser and completes his title to the legacy.

(ii) A bequeaths 1,000 rupees to B with interest from his death. The executor does not assent to his legacy until the expiration of a year from A's death. B is entitled to interest from the death of A.

(This is sec. 298 of the Succession Act X of 1865 with the addition of the words " or administrator." It is in accordance with secs. 116 & 143 of the Probate and Administration Act V of 1881).

Executor when to deliver legacies

337. An executor or administrator is not bound to pay or deliver any legacy until the expiration of one year from the testator's death.

Illustration.

A by his will directs his legacies to be paid within six months after his death. The executor is not bound to pay them before the expiration of a year.

(This is sec. 297 of the Succession Act X of 1865 with the addition of the words " or administrator." It is in accordance with secs. 117 & 143 of the Probate and Administration Act V of 1881).

COMMENTARY.

Executor's Year.—An executor is not *bound* to pay or deliver any legacy until the expiration of one year which is called "the executor's year" from the testator's death. There is nothing to prevent an executor from paying within one year but he cannot be *compelled* by the legatee to pay within that time even if the testator directs that all the legacies should be discharged within six months, *Brooke v. Lewis*, 6 Madd. 358; *Macleod v. Sorabjee*, 7 Bom. L. R. 755, on appeal *Bai Jaiji v. Macleod*, 30 Bom 493. This allowance of one year is given for convenience in order that the debts of the testator may be ascertained so as to make a proper distribution of the estate. The testator may extend the period by his will, *Adm.-General v. Hughes*, 40 Cal. 192.

If a legacy is given subject to a condition subsequent, the divesting contingency will not prevent the legatee from receiving his legacy at the end of one year from the testator's death and he is not bound to give security for repayment of the money, in case the event should happen. For example, a legacy is given to A but if he *marries a certain person then to B*, A is *unmarried at the testator's death*. He is entitled to the legacy without giving any security. (Williams on Executors, 10th Edn, p 1116).

Limitation.—Art. 123 of the Limitation Act applies for recovery of a legacy, see *Rajah Parthasarathy v. Rajah Venkatadri*, 46 Mad. 190; *Venkatadri v. Parthasarathi*, 27 Bom. L. R. 823 (P. C). A legatee cannot file a suit in the Small Causes Court to recover the amount of the legacy; his remedy is to file a suit for administration, *Okhoy Coomar v. Koylash*, 17 Cal. 387. An executor as such is not an express trustee for the legatee, *Barada v. Gajendra*, 13 C. W. N. 559.

CHAPTER IX.

Of the Payment and Apportionment of Annuities.

338. Where an annuity is given by a will, and no time is fixed for its commencement, it shall commence from the testator's death, and the first payment shall be made at the expiration of a year next after that event.

Commencement of annuity when no time fixed by will.

(This is sec. 298 of the Succession Act X of 1865 and sec. 118 of the Probate and Administration Act V of 1881).

339. Where there is a direction that the annuity shall be paid quarterly or monthly, the first payment shall be due at the end of the first quarter or first month, as the case may be, after the testator's death; and shall, if the executor or administrator thinks fit, be paid when due, but the executor or administrator shall not be bound to pay it till the end of the year.

When annuity, to be paid quarterly or monthly, first falls due.

(This is sec. 299 of the Succession Act X of 1865 with the addition of the words "or administrator." It is in accordance with secs. 119 & 149 of the Probate and Administration Act V of 1881).

340. (1) Where there is a direction that the first payment of an annuity shall be made within one month or any other division of time from the death of the testator, or on a day certain, the successive payments are to be made on the anniversary of the earliest day on which the will authorises the first payment to be made.

Dates of successive payments when first payment directed to be made within a given time or on day certain: death of annuitant before date of payment.

(2) If the annuitant dies in the interval between the times of payment, an apportioned share of the annuity shall be paid to his representative.

(This is sec 390 of the Succession Act X of 1885 and sec. 120 of the Probate and Administration Act V of 1881)

COMMENTARY.

Annuity.—Where an annuity is given and no time is fixed for its commencement it shall commence from the testator's death but the first payment shall be made at the expiration of a year next after that event. Where the annuity is directed to be paid *quarterly* or *monthly* the first payment shall be due at the end of the first quarter or first month and may be paid when due, but the executor shall not be bound to pay it till the end of the year. If the annuitant dies in the interval an apportioned share of the annuity shall be paid to his representatives. Where there is no fund charged for the payment of an annuity a Government annuity shall be purchased. (Sec. 343).

CHAPTER X.

Of the Investment of Funds to provide for Legacies.

341. Where a legacy, not being a specific legacy, is given for life, the sum bequeathed shall at the end of the year be invested in such securities as the High Court may by any general rule authorize or direct, and the proceeds thereof shall be paid to the legatee as the same shall accrue due.

Investment of sum bequeathed where legacy, not specific, given for life

(This is sec 391 of the Succession Act X of 1885 and sec. 121 of the Probate and Administration Act V of 1881).

COMMENTARY.

Bequest for Life.—This section deals with a general legacy for life. If a specific legacy is given for life then the thing specifically bequeathed is to be retained in its same condition. As regards bequest of residue for life, see sec. 345.

Investment of general legacy, to be paid at future time; disposal of intermediate interest.

342. (1) Where a general legacy is given to be paid at a future time, the executor or administrator shall invest a sum sufficient to meet it in securities of the kind mentioned in section 341.

(2) The intermediate interest shall form part of the residue of the testator's estate.

(This is sec 302 of the Succession Act X of 1865 with the addition of the words "or administrator." It is in accordance with secs. 122 & 118 of the Probate and Administration Act V of 1881).

COMMENTARY.

(See sec. 344).

343. Where an annuity is given and no fund is charged with its payment or appropriated by the will to answer it, a Government annuity of the specified amount shall be purchased, or, if no such annuity can be obtained, then a sum sufficient to produce the annuity shall be invested for that purpose in securities of the kind mentioned in section 341.

Procedure when no fund charged with, or appropriated to annuity.

(This is sec. 303 of the Succession Act X of 1865 and sec. 123 of the Probate and Administration Act V of 1881)

COMMENTARY.

Depreciation of Securities.—If a testator directs his executors to lay out in what Government securities they please a sum of money as would produce a certain annual income and the executors so lay out and afterwards the income diminishes by conversion by Government into securities yielding less income, the annuitant is entitled to have the deficiency made good, *May v. Bennett*, 1 Russ. Ch. Cas. 370; *Davies v. Wattier*, 1 Sim. & Stu. 463.

344. Where a bequest is contingent, the executor or administrator is not bound to invest the amount of the legacy, but may transfer the whole residue of the estate to the residuary legatee, if any, on his giving sufficient security for the payment of the legacy if it shall become due.

Transfer to residuary legatee of contingent bequest.

(This is sec. 304 of the Succession Act X of 1865 with the addition of the words "or administrator." It is in accordance with secs. 124 & 119 of the Probate and Administration Act V of 1881).

COMMENTARY.

Future and Contingent Bequest.—Where a general legacy is payable at a future time the executor must invest a sum sufficient to meet it in authorized securities. The intermediate interest shall form a part of the residue. If the executor fails to invest a sufficient amount in authorized securities the legatee may sue him for the purpose and it would not be necessary to show the wasting of assets by the executor or that he was in insolvent circumstances, *Ferrand v. Prentice*, Ambl. 273; *Johnson v. Mills*, 1 Ves. Sen. 282. When the appropriation is made the legatee must bear any losses and enjoy any additions which the fluctuation of the price of stock may cause, *Green v. Pigot*, 1 Bro. C. C. 105.

In case of a *contingent legacy* the executor is not bound to invest the amount of the legacy but he may transfer the whole residue to the residuary legatee on his giving security for the payment of the legacy when it shall become due. There is this distinction between a legacy payable *in futuro* and a *contingent legacy* that where the legacy is payable *in futuro* the legatee has a right to say, "Although my legacy is payable in future it is a vested legacy and I require you to invest the amount of it," and not only would the legatee have the right to require that, but he *could insist* upon its being done; not so in the case of a *contingent legacy*. In the case of a *contingent legacy* if the executors do appropriate and there is loss by depreciation in value of the stock the loss cannot fall on the legatee, *Re Hall*, (1903) 2 Ch. 226. (Williams on Executors, 18th Edn., pp. 1131-1135).

345. (1) Where the testator has bequeathed the residue of his estate to a person for life without any direction to invest it in any particular securities, so much thereof as is not at the time of the testator's decease invested in securities of the kind mentioned in section 341 shall be converted into money and invested in such securities.

Investment of residue bequeathed for life, without direction to invest in particular securities.

(2) This section shall not apply if the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person.

[Clause (1) is sec. 305 of the Succession Act X of 1865]

346. Where the testator has bequeathed the residue of his estate to a person for life with a direction that it shall be invested in certain specified securities, so much of the estate as is not at the time of his death invested in securities of the specified kind shall be converted into money and invested in such securities.

Investment of residue bequeathed for life, with direction to invest in specified securities.

(This is sec. 306 of the Succession Act X of 1865 and sec. 125 of the Probate and Administration Act V of 1881).

347. Such conversion and investment as are contemplated by sections 345 and 346 shall be made at such times and in such manner as the executor or administrator thinks fit; and, until such conversion and investment are completed, the person who would be for the time being entitled to the income of the fund when so invested shall receive interest at the rate of four per cent. per annum upon the market-value (to be computed as at the date of the testator's death) of such part of the fund as has not been so invested:

Time and manner of conversion and investment.

Provided that the rate of interest prior to completion of investment shall be six per cent. per annum when the testator was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person.

(This is sec 307 of the Succession Act X of 1865 with the addition of the words " or administrator." It is in accordance with secs 126 & 148 of the Probate and Administration Act V of 1881)

COMMENTARY.

Bequest of Residue for Life.—(1) Where the *residue* is bequeathed to a person for life *without* any direction to invest it in any particular securities, the residue or so much thereof as is not invested in authorized securities must be converted into money and invested in authorized securities. It is the duty of an executor or an administrator whenever there are successive interests created in the subject of a bequest or of residue consisting of property in its nature perishable and daily wearing out, to convert the same into money and invest it in authorized securities.

This is known in England as **The Rule in *Howe v. Lord Dartmouth*** and it amounts to this, that where there is a residuary bequest to be enjoyed by several persons in succession a Court of Equity, in the absence of any evidence of a contrary intention will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession, and, as the only means of giving effect to such intention, will direct the conversion into permanent investments of a recognised character of all such parts of the estate as are of a wasting or reversionary character, *e. g.* leaseholds, and also all such other existing investments as are not of the recognised character and are consequently deemed to be more or less hazardous. (As to what are authorized securities see sec. 20 Indian Trusts Act II of 1882 and rule 844 of the Bombay High Court Rules).

This rule will only apply when the testator has not expressed any contrary intention. Where the testator has made a specific bequest of a property to two or more persons in succession, no conversion will be directed, though the property may be of a wasting nature. (Sec. 147). Even where the bequest is not specific, yet if the Court find in the will an indication of intention that the property is to be enjoyed in its existing state, that intention must be carried into effect.

(2) Where the *residue* is bequeathed to a person for life, with a direction that it shall be invested in certain specified securities, the residue or so much thereof as is not invested in those securities must be converted into money and invested in such securities.

The executor or administrator may make the conversion and investment at such time and in such manner as he shall in his discretion think fit, and the Court will not as a rule interfere if the testator has left him absolute discretion in that respect, *Mowjibhai v. Muljibhai*, 4 Bom. L. R. 199. But the executors ought not, without great reason, to permit money to remain upon hazardous securities longer than is absolutely necessary. If, therefore, owing to unreasonable delay in making the conversion and investment, the residue or any portion thereof is lost the executor will be held personally responsible for the same. Though the *prima facie* rule is that the executors should get in the assets within a year, there is no inflexible rule as to the time within which they are bound to do so, even with regard to risky securities. It depends on the circumstances of each case. But the executors who do not convert by that time will have to show some reason why they did not do so, *Hughes v. Empson*, 22 Beav. 181; *Grayburn v. Clarkson*, L. R. 3 Ch. 605.

Executors acting under a will by which *an absolute discretion is given to them to postpone the sale and conversion of the testator's estate*, are not bound by the ordinary rule above referred to, *viz.*, to convert the property within a year, even though some of the property consists of shares in an unlimited company, or of a business carried on by the testator, nor will they be liable in the absence of *mala fides* for loss arising to the estate by non-conversion. So, too, an express power to retain existing investments takes a case out of the rule as to conversion of perishable property. (See Williams on Executors, 10th Edn., pp. 1457-1459).

Until such conversion and investment is made the person who is entitled to the income shall receive interest at the rate of 4 % per annum, in the case of Europeans, Parsis and Indian Christians and at the rate of 6 % per annum, in the case of Hindus and Mahomedans upon the market-value of the part of the fund as shall not have been so invested.

348. (1) Where, by the terms of a bequest, the legatee is

Procedure where minor entitled to immediate payment or possession of bequest, and no direction to pay to person on his behalf

entitled to the immediate payment or possession of the money or thing bequeathed, but is a minor, and there is no direction in the will to pay it to any person on his behalf, the executor or administrator shall pay or deliver the same into the Court of the District Judge, by whom or by whose District

Delegate the probate was, or letters of administration with the will annexed were granted, to the account of the legatee, unless the legatee is a ward of the Court of Wards.

(2) If the legatee is a ward of the Court of Wards, the legacy shall be paid to the Court of Wards to his account.

(3) Such payment into the Court of the District Judge, or to the Court of Wards, as the case may be, shall be a sufficient discharge for the money so paid.

(4) Money when paid in under this section shall be invested in the purchase of Government securities, which, with the interest thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, as the Judge or the Court of Wards, as the case may be, may direct.

(This is sec. 303 of the Succession Act X of 1925 and sec. 127 of the Probate and Administration Act V of 1851)

COMMENTARY.

Legacy to a minor.—Where a legacy is given to a person who is a minor and there is no direction in the will to pay it to any person on his behalf the executor shall pay the same—

(1) To the District Judge by whom the probate or letters of administration with the will annexed are granted to the account of the legatee, or

(2) Into the Court of Wards if the legatee be a ward of that Court.

The money so paid shall be invested in authorized securities which with the interest shall be paid to the person entitled thereto or otherwise applied for his benefit as the Judge or the Court may direct.

In case of a minor if the legacy is *immediately* payable the executor must pay the legacy as above. He would not be justified in paying the legacy to the father or any other relation of the minor, without the sanction of the Court. If the legacy is paid to the father even with the most honest intentions, the executor will nevertheless be held liable to pay it over again to the legatee on his attaining majority. (Williams on Executors, 10th Edn., p. 1138). But where the executor is directed to pay the legacy not to the child but to a trustee or to any other person for him the executor will be justified in paying the legacy to the trustee or to the person to whom the legacy is directed to be paid.

Where interest upon legacies given to children is directed to be paid to their parents and applied by them for their maintenance, the parents take subject to no account, *Hammond v. Neame*, 1 Sw. 35. And a gift to the parent for the benefit or maintenance of himself and his children may be safely paid to the parent, *Cooper v. Thornton*, 3 B. C. C. 96, 186. (Theobald on Wills, 7th Edn., p. 493). Where the parents of the minor legatee are unable to maintain him, the Court will order maintenance out of the interest of the legacy under this section even though the income may be expressly directed to be accumulated. But no such allowance will be made by the Court if the parents are able to maintain the legatee.

CHAPTER XI.

Of the Produce and Interest of Legacies.

349. The legatee of a specific legacy is entitled to the clear produce thereof, if any, from the testator's death.

Legatee's title to produce of specific legacy.

Exception.—A specific bequest, contingent in its terms, does not comprise the produce of the legacy between the death of the testator and the vesting of the legacy. The clear produce of it forms part of the residue of the testator's estate.

Illustrations.

(i) A bequeaths his flock of sheep to B. Between the death of A and delivery by his executor the sheep are shorn or some of the ewes produce lambs. The wool and lambs are the property of B.

(ii) A bequeaths his Government securities to B, but postpones the delivery of them till the death of C. The interest which falls due between the death of A and the death of C belongs to B, and must, unless he is a minor, be paid to him as it is received.

(iii) The testator bequeaths all his four per cent Government promissory notes to A when he shall complete the age of 18. A, if he completes that age, is entitled to receive the notes, but the interest which accrues in respect of them between the testator's death and A's completing 18, forms part of the residue.

(This is sec. 507 of the Succession Act X of 1895 and sec. 128 of the Probate and Administration Act I of 1891).

COMMENTARY.

Specific Legacy.—A specific legatee is entitled to the clear produce of the legacy *from the testator's death*, unless the legacy is contingent in which case the clear produce between the death of the testator and the vesting of the legacy goes to the residuary legatee.

Residuary legatee's
title to produce of
residuary fund

350. The legatee under a general residuary bequest is entitled to the produce of the residuary fund from the testator's death.

Exception.—A general residuary bequest contingent in its terms does not comprise the income which may accrue upon the fund bequeathed between the death of the testator and the vesting of the legacy. Such income goes as undisposed of.

Illustrations.

(i) The testator bequeaths the residue of his property to A, a minor, to be paid to him when he shall complete the age of 18. The income from the testator's death belongs to A.

(ii) The testator bequeaths the residue of his property to A when he shall complete the age of 18. A, if he completes that age, is entitled to receive the residue. The income which has accrued in respect of it since the testator's death goes as undisposed of.

(This is sec. 310 of the Succession Act X of 1865 and sec. 129 of the Probate and Administration Act V of 1881).

COMMENTARY.

Residuary Legacy.—A residuary legatee is entitled to the produce of the residuary fund *from the testator's death*, unless the legacy is contingent in which case the income arising between the death of the testator and the vesting of the legacy will go as undisposed of, *Rajah Parthasarathy v. Rajah Venkatadri*, 46 Mad. 190.

Demonstrative Legacy.—According to the English law interest is payable on the demonstrative legacy *from the expiry of one year from the testator's death*, *In re Walford, Kenyon v. Walford*, (1912) 1 Ch. 219. The same is the law in India, *Chinnam v. Tadikonda*, 29 Mad. 155; *Adm.-General v. A. D. Christiana*, 43 Cal. 201; *Sahib Mirza v. Umda Khanam*, 19 Cal. 444.

Interest when no
time fixed for payment
of general legacy.

351. Where no time has been fixed for the payment of a general legacy, interest begins to run from expiration of one year from the testator's death.

Exception.—(1) Where the legacy is bequeathed in satisfaction of a debt, interest runs from the death of the testator.

(2) Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, the legacy shall bear interest from the death of the testator.

(3) Where a sum is bequeathed to a minor with a direction to pay for his maintenance out of it, interest is payable from the death of the testator.

(This is sec. 311 of the Succession Act X of 1865 and sec. 130 of the Probate and Administration Act V of 1881).

COMMENTARY.

(See next section.)

352. Where a time has been fixed for the payment of a general legacy, interest begins to run from the time so fixed. The interest up to such time forms part of the residue of the testator's estate.

Interest when time fixed

Exception.—Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee and the legatee is a minor, the legacy shall bear interest from the death of the testator, unless a specific sum is given by the will for maintenance or unless the will contains a direction to the contrary.

(This is sec. 312 of the Succession Act X of 1865 and sec. 131 of the Probate and Administration Act V of 1881)

COMMENTARY.

General Legacies.—(1) Where no time has been fixed for the payment of a general legacy, interest begins to run from the expiration of one year from the testator's death.

(1) Where no time has been fixed for payment

Exceptions.—Interest will begin to run from the death of the testator where no time is fixed for payment in the following three cases—

- (a) Where the legacy is bequeathed in satisfaction of a debt, *Rajamannar v. Venkatakrishnayya*, 25 Mad. 361.
- (b) Where the testator was a parent or a more remote ancestor of the legatee or had placed himself in *loco parentis* to the legatee. (A legacy to a wife does not carry interest until a year from the death, *Lowndes v. Lowndes*, 15 Ves. 301).
- (c) Where the legacy is given to a minor with a direction to pay for his maintenance out of it.

(2) Where a time has been fixed for the payment of a general legacy interest begins to run from the time so fixed. The intervening interest forms part of the residue.

(2) Where time has been fixed for payment.

Exception.—Interest will begin to run from the death of the testator even when the time has been fixed for payment, if the testator was a parent or a more

remote ancestor of, or was in *loco parentis* to the legatee and the legatee is a minor, unless a sum is given by the will for his maintenance.

Contingent Legacy.—A contingent legacy does not carry interest while in suspense even if the legacy is from a parent or a person in *loco parentis* to a child contingent upon the child attaining majority or marriage, *In re Abrahams, Abrahams v. Bendon*, (1911) 1 Ch. 108.

353. The rate of interest shall be four per cent. per annum in all cases except when the testator was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, in which case it shall be six per cent. per annum.

(This is sec 313 of the Succession Act X of 1865 and sec. 132 of the Probate and Administration Act V of 1881)

354. No interest is payable on the arrears of an annuity within the first year from the death of the testator, although a period earlier than the expiration of that year may have been fixed by the will for making the first payment of the annuity.

No interest on arrears of annuity within first year after testator's death

(This is sec 314 of the Succession Act X of 1865 and sec. 133 of the Probate and Administration Act V of 1881).

355. Where a sum of money is directed to be invested to produce an annuity, interest is payable on it from the death of the testator.

Interest on sum to be invested to produce annuity

(This is sec. 315 of the Succession Act X of 1865 and sec. 134 of the Probate and Administration Act V of 1881)

COMMENTARY.

Annuity.—No interest is payable on the arrears of an annuity for the first year, though an earlier time may have been fixed for its payment. But where a sum of money is directed to be invested to produce an annuity, interest is payable on it from the death of the testator.

Bequest for Life.—If a sum of money is given to one for life with remainder over, interest begins to run from the end of a year from the testator's death, though no interest becomes due till the end of two years, *Gibson v. Bott*, 7 Ves. 96.

CHAPTER XII.

Of the Refunding of Legacies.

356. When an executor or administrator has paid a legacy under the order of a Court, he is entitled to call upon the legatee to refund in the event of the assets proving insufficient to pay all the legacies.

Refund of legacy paid under Court's orders.

(This is sec. 316 of the Succession Act X of 1865 with the addition of the words "or administrator." It is in accordance with secs. 135 & 148 of the Probate and Administration Act V of 1881).

357. When an executor or administrator has voluntarily paid a legacy, he cannot call upon a legatee to refund in the event of the assets proving insufficient to pay all the legacies.

No refund if paid voluntarily.

(This is sec. 317 of the Succession Act X of 1865 with the addition of the words "or administrator." It is in accordance with secs. 136 & 148 of the Probate and Administration Act V of 1881).

358. When the time prescribed by the will for the performance of a condition has elapsed, without the condition having been performed, and the executor or administrator has thereupon, without fraud, distributed the assets; in such case, if further time has been allowed under section 137 for the performance of the condition, and the condition has been performed accordingly, the legacy cannot be claimed from the executor or administrator, but those to whom he has paid it are liable to refund the amount.

Refund when legacy has become due on performance of condition within further time allowed under section 137.

(This is sec. 318 of the Succession Act X of 1865 with the addition of the words "or administrator." It is in accordance with secs. 137 & 148 of the Probate and Administration Act V of 1881).

359. When the executor or administrator has paid away the assets in legacies, and he is afterwards obliged to discharge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion.

When each legatee compellable to refund in proportion

(This is sec. 319 of the Succession Act X of 1865 with the addition of the words "or administrator." It is in accordance with secs. 138 & 148 of the Probate and Administration Act V of 1881).

COMMENTARY.

I. When the "Executor" can compel a legatee to Refund.—

(a) When the legacy is paid *under an order of the Court*, the executor is entitled to compel the legatee to refund in case of a deficiency of assets for payment of all the legacies.

(b) When the executor pays away the assets in legacies and *afterwards debts appear* of which he had no previous notice and which he is obliged to discharge he may compel the legatees to refund in proportion.

(c) But when the executor has *voluntarily* paid a legacy, if the assets prove insufficient to pay all the *legacies* he cannot call upon the paid legatee to refund. In

such a case if the executor is solvent he must himself pay the rest of the legacies, *Orr v. A'loines*, 2 Ves. Sen. 193.

360. Where an executor or administrator has given such notices as the High Court may, by any general rule, prescribe or, if no such rule has been made, as the High Court would give in an administration-suit, for creditors and others to send in to him their claims against the estate of the deceased, he shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets, or any part thereof, in discharge of such lawful claims as he knows of, and shall not be liable for the assets so distributed to any person of whose claim he shall not have had notice at the time of such distribution ;

Provided that nothing herein contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, in the hands of the persons who may have received the same respectively.

(This is sec 340 of the Succession Act X of 1865 with the addition of the words " as the High Court may, by any general rule, prescribe or, if no such rule has been made," after the word notices It is in accordance with sec 139 of the Probate and Administration Act V of 1881)

COMMENTARY.

Distribution of Assets.—It is the duty of an executor or an administrator, prior to distributing the assets amongst the legatees or next-of-kin as the case may be, to give a notice as would be given in an administration suit inviting all creditors and other claimants of the deceased to send in their claims to the executor or administrator within the time specified in such notice. (For form of notice see Bombay High Court Rules p 318).

On the expiration of the period prescribed in the notice and after satisfying the claims (if any) received in pursuance thereof the executor or administrator may distribute the assets and in such a case he will not be liable to any creditor of the deceased who may apply for the payment of his debt thereafter. The creditor's remedy in such a case is to follow the assets in the hands of the legatees or the next-of-kin of the deceased as the case may be.

If the estate of the deceased is subject to any contingent or future liabilities it is the duty of the executor or administrator before distributing the estate amongst the legatees or next-of-kin to take a sufficient indemnity from them to meet the liabilities whenever they may become due.

361. A creditor who has not received payment of his debt may call upon a legatee who has received payment of his legacy to refund, whether the assets of the testator's estate were or were not sufficient at

Creditor may call upon legatee to refund

time of his death to pay both debts and legacies ; and whether the payment of the legacy by the executor or administrator was voluntary or not.

(*This is sec 321 of the Succession Act X of 1865 with the addition of the words "or administrator."* It is in accordance with secs. 140 & 148 of the Probate and Administration Act V of 1881).

COMMENTARY.

II. When a "Creditor" can compel a legatee to Refund.—An unsatisfied creditor can compel a satisfied legatee to refund whether the assets were or were not sufficient to pay both the debts and legacies and whether the legacy was paid to him voluntarily or by compulsion. A creditor's first remedy is to proceed against the executor for the payment of his debt. But if the executor has given a notice to all the creditors to come in and prove their claims within a certain time and if a particular creditor fails to appear within that time and the executor has distributed the estate, the creditor has no remedy against the executor but he can follow the assets in the hands of the persons who may have received the same.

362. If the assets were sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy, or who has been compelled to refund under section 361, cannot oblige one who has received payment in full to refund, whether the legacy were paid to him with or without suit, although the assets have subsequently become deficient by the wasting of the executor.

(*This is sec. 322 of the Succession Act X of 1865 and sec. 141 of the Probate and Administration Act V of 1881. The word "administrator" does not appear in this section, but it appears to be by oversight.*)

363. If the assets were not sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy must, before he can call on a satisfied legatee to refund, first proceed against the executor or administrator if he is solvent ; but if the executor or administrator is insolvent or not liable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion.

(*This is sec. 323 of the Succession Act X of 1865 with the addition of the words "or administrator."* It is in accordance with secs. 142 & 143 of the Probate and Administration Act V of 1881).

364. The refunding of one legatee to another shall not exceed the sum by which the satisfied legacy ought to have been reduced if the estate had been properly administered.

Limit to refunding
of one legatee to
another

Illustration.

A has bequeathed 240 rupees to B, 480 rupees to C, and 720 rupees to D. The assets are only 1,200 rupees and, if properly administered, would give 200 rupees to B, 400 rupees to C, and 600 rupees to D. C and D have been paid their legacies in full, leaving nothing to B. B can oblige C to refund 80 rupees, and D to refund 120 rupees.

(This is sec. 324 of the Succession Act X of 1865 and sec. 14 of the Probate and Administration Act V of 1881).

COMMENTARY.

III. When a "Legatee" can compel another Legatee to Refund.—

(a) If the assets were originally *sufficient* to satisfy all the legacies and afterwards by the wasting of the executor there is a deficiency a legatee who has not received payment or who has been compelled to refund by a creditor cannot compel a satisfied legatee to refund, whether the legacy was paid to him with or without suit.

(b) But if the assets were *not originally sufficient* to satisfy all the legacies an unsatisfied legatee must first proceed against the executor, if he is solvent, for the payment of his legacy. But if the executor is insolvent or not liable to pay, the unsatisfied legatee may compel a satisfied legatee to refund in proportion, i. e., by such sum as the satisfied legatee ought to have been reduced if the estate had been properly administered.

(c) Where a legacy is *conditional* and the time prescribed for the performance of the condition has elapsed and the executor has distributed the estate and further time has been given to the legatee to perform the condition, because he was prevented from performing the condition by fraud and the condition is performed, the legatee may compel the other satisfied legatees to refund. He cannot sue the executor.

Limitation.—Three years from the date of payment or distribution. (Art. 43 Limitation Act).

Refunding to be without interest. **365.** The refunding shall in all cases be without interest.

(This is sec. 325 of the Succession Act X of 1865 and sec. 144 of the Probate and Administration Act V of 1881).

366. The surplus or residue of the deceased's property, after payment of debts and legacies, shall be paid to the residuary legatee when any has been appointed by the will.

Residue after usual payments to be paid to residuary legatee.

(This is sec. 326 of the Succession Act X of 1865 and sec. 145 of the Probate and Administration Act V of 1881).

COMMENTARY.

Residuary Legatee.—After all the debts and legacies are paid the executor must pay the surplus or residue to the residuary legatee (if any) appointed by the will. "A residuary legatee has a right to insist that in the course of the first year

after the testator's death the executor shall, if it be possible, pay the debts, legacies, and funeral and testamentary expenses so that the clear residue may be ascertained and paid over to him," *Wrightwick v Lord*, 6 H. L. C. 217 at 226; *McLeod v. Sorabji*, 7 Bom. L. R. 755; *Ganoda v. Nalini*, 36 Cal. 28.

367. Where a person not having his domicile in British India has died leaving assets both in British India and in the country in which he had his domicile at the time of his death, and there has been a grant of probate or letters of administration in British India with respect to the assets there and a grant of administration in the country of domicile with respect to the assets in that country, the executor or administrator, as the case may be, in British India, after having given such notices as are mentioned in section 360, and after having discharged, at the expiration of the time therein named, such lawful claims as he knows of, may, instead of himself distributing any surplus or residue of the deceased's property to persons residing out of British India who are entitled thereto, transfer, with the consent of the executor or administrator, as the case may be, in the country of domicile, the surplus or residue to him for distribution to those persons.

(This is sec. 386-A of the Succession Act X of 1865 and sec. 145-A of the Probate and Administration Act V of 1881).

COMMENTARY.

If a person whose domicile is not in British India dies leaving assets at two places, *viz.*, in the country of his domicile and also in British India, then this section gives to the Indian executor or administrator two courses (a) he may distribute the surplus amongst the persons entitled thereto according to the law of domicile or (b) he may transfer the residue to the representative of the deceased in the country of domicile.

CHAPTER XIII.

Of the Liability of an Executor or Administrator for Devastation.

Liability of executor or administrator for devastation

368. When an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned.

Illustrations.

(i) The executor pays out of the estate an unfounded claim. He is liable to make good the loss.

(ii) The deceased had a valuable lease renewable by notice which the executor neglects to give at the proper time. The executor is liable to make good the loss.

(iii) The deceased had a lease of less value than the rent payable for it, but terminable on notice at a particular time. The executor neglects to give the notice. He is liable to make good the loss.

(This is *sec. 327 of the Succession Act X of 1865* and *sec. 146 of the Probate and Administration Act V of 1881*).

COMMENTARY.

(See next section).

Liability of executor or administrator for neglect to get in any part of property.

369. When an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount.

Illustrations.

(i) The executor absolutely releases a debt due to the deceased from a solvent person, or compounds with a debtor who is able to pay in full. The executor is liable to make good the amount.

(ii) The executor neglects to sue for a debt till the debtor is able to plead that the claim is barred by limitation and the debt is thereby lost to the estate. The executor is liable to make good the amount.

(This is *sec. 328 of the Succession Act X of 1865* and *sec. 147 of the Probate and Administration Act V of 1881*).

COMMENTARY.

The executors or administrators are answerable, as far as they have assets, for debts of every description, due from the deceased.

What shall be said to be the "assets" in the hands of an executor or administrator.—All the property of the deceased, moveable or immoveable, whether in possession or in remainder, which after his death the executor or administrator gets into his hands as duly belonging to him in his right of executor or administrator wherever and in whatever part of the world the same may be situate, shall be said to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee. Property over which the testator had a general power of appointment shall also be deemed to be assets in the hands of the executor for the payment of the testator's debts, *Deysus v. Lawley*, (1903) A. C. 411; *In re Lakshminarayana Ammal*, 25 Mad. 515. (As to the liability of an executor or administrator to account for assets situate in foreign countries see the leading case, *Ewing v. Orr Ewing*, 9 A. C. 34. Williams on Executors, 10th Edn., p. 1286). If the assets are undervalued the procedure is to submit interrogatories, *Anilubala v. Rajendrnath*, 43 Cal. 300.

Goods which have increased since the death of the testator or the intestate are assets in the hands of the executor or administrator, *e. g.*, if the sheep or other cattle of the testator bear lambs after his death. Choses in action will also be assets but the executor or administrator will not be chargeable until he has received the moneys. The executor or administrator will, however, be liable if he releases the debt or does not take proceedings until the debt becomes barred by limitation. (III. ii., sec. 369). Where an executor who owes money to the deceased accepts the

executorship his debt becomes at once assets and he is responsible for the amount, *Yakub Ebrahim v. Bai Rahimatbai*, 10 Bom. L. R. 346.

I. Personal liability of an Executor or Administrator for Devastavit.— If the executor or administrator misapply the estate or subject it to loss or if by his neglecting to get in any part of the estate a loss is occasioned to the estate the executor or administrator is personally liable.

This species of conduct is called in law a *Devastavit*, that is, wasting of the estate and is defined to be a mismanagement of the estate and effects of the deceased in squandering and misapplying the same contrary to the duty imposed on executors or administrators for which they shall answer out of their own pockets as far as they had or might have had assets of the deceased.

It is a breach of duty on the part of an executor or an administrator to mix the moneys of the estate with their own in one common fund and such a course of dealing may expose him to a criminal as well as civil liability, *In Re D. Cowie*, 6 Cal. 70. If an executor or administrator succeeds another on the death or termination of authority by operation of law of the other executor or administrator it is his duty to recover and take possession of the unadministered assets of the deceased, to call for accounts and to recover damages, if necessary, for waste and misappropriation by his predecessor. If he fail to do so he must be held liable to the extent to which the estate would have been benefited if he had faithfully performed his duty, *Barada v. Gajendra*, 13 C. W. N. 557.

Two principal rules, however, must be borne in mind before an executor or an administrator can be made liable: 1st, that the Court is extremely liberal in making every possible allowance and cautious not to hold executors or administrators liable upon slight grounds, because that would deter persons from undertaking these offices; 2nd, that care must be taken to guard against an abuse of their trust, *Powell v. Evans*, 5 Ves. 843. A *devastavit* may not only be committed by a direct abuse of the effects of the deceased as by spending or consuming them but also by such acts of negligence and wrong administration as will disappoint the claimants on the assets. An executor is not justified in unnecessarily keeping his testator's money dead in his hands and therefore, if the exigencies of his office do not require otherwise, the executor should invest the unemployed money in authorized securities; and if the moneys are invested in such securities, he will not be liable if the securities fall in price. But if the investment is made in any other securities the loss will be thrown on him, although there be no *mala fides* on his part, and if any profit happen by the rise in the value of such securities, the executor shall not have the benefit, *Howe v. Lord Dartmouth*, 7 Ves. 147; *Clough v. Bond*, 3 My. & Cr. 490. (Williams on Executors, 10th Edn., pp. 1434-1467).

An executor is not to allow the assets of the testator outstanding on *personal* security, though the loan may have been made by the testator himself. He must take active steps to realize such security. An executor has no power to lend the testator's moneys on personal securities, unless he is specially authorized by the will to do so; but even in that case an executor cannot lend money to his co-executor on his personal security. An executor will be equally liable if he knows that a *co-executor* is a debtor to the testator's estate and does not take active steps to recover the amount, *Styles v. Guy*, 1 Mac. & G. 422.

An executor will be liable if he mixes the moneys of the testator's estate with his own and the onus will lie on him to show that the property does not belong to the estate but to himself, *Tulsamma v. Venkatasubbayya*, 48 Mad. 697.

An executor has authority to compound a debt due to the deceased and will not be charged for *devastavit* if he has exercised his discretion honestly and fairly in giving time to a debtor, although loss may result from delay, *Re Houghton*, (1904) 1 Ch. 622; *Chidambara v. Krishnasami*, 39 Mad. 365; see *contra Khusrubhai v. Hormajsha*, 17 Bom. 637. Counsel's advice will not protect an executor or administrator against liability for *devastavit*. The Court will proceed not upon what advice the executor got but upon the merits of the acts he has done. "If under the best advice he could procure he acts wrong it is his misfortune, but public policy requires that he should be the person to suffer," *Dayle v. Blake*, 2 Sch. & Lef. 239; *Re Knight's Trusts*, 29 Beav. 49.

An executor will not in general be charged with interest but from the end of a year after the testator's death. After the period of one year if an executor keeps money in his hands without any apparent reason, but merely for the purpose of using it, then it becomes negligence and a breach of trust and interest will be charged.

Devastavit of Co-executor.—A *devastavit* by one of two executors or administrators will not charge his companion provided he has not intentionally or otherwise contributed to it. Under ordinary circumstances an executor will not be responsible for the assets come to the hands of his co-executor. But where an executor possessing assets hands them over to a co-executor and they are misapplied by the co-executor, the executor who so hands them over will be answerable for their misapplication, unless he can show a good reason for having so acted, *Townsend v. Barber*, 2 Dick. 356. Generally an executor is liable for the *devastavit* of his co-executor, when by any act done by him any part of the estate comes to the hands of his co-executor and is misapplied by him. Again one executor is not answerable for the receipt of the other, merely by taking probate, permitting the other to possess the assets and joining in acts necessary to enable him to administer. The established rule, however, is that it is the duty of all executors to watch over, and, if necessary, to correct the conduct of each other and that if he stands by and sees a breach committed by his co-executor, he becomes responsible, *Lincoln v. Wright*, 4 Beav. 427. (*Williams on Executors*, 10th Edn, pp. 1467-1477).

One executor has independently of his co-executor a full and absolute control over the estate of the testator. One executor has power to give a valid receipt for money received by him and the receipt will be binding on the co-executors and will be a sufficient discharge to the person paying the money. If, therefore, an executor join with a co-executor in a receipt he does a wanton and unnecessary act and the rule is that if executors join in giving receipts, they are all answerable for the amount of the money received though one of them may have received the moneys. In this respect the case of a trustee is different. If *trustees* join in giving a receipt and only one receives the money the other is not answerable because his joining in the discharge is necessary, one trustee not being competent to give a valid receipt, *Ex-parte Belchier*, Amb. 219.

The liability of an executor for joining in giving receipts frequently came into question before the Courts and the same has been considerably modified by later

decisions. Lord Eldon in *Walker v. Symonds*, 3 Sw. 63 laid down as follows:— "Though one executor has joined in a receipt, yet whether he is liable shall depend on his *acting*. The former was a simple rule that *joining* should be considered as *acting*, but now *joining alone* does not impose responsibility. The distinction with respect to mere signing appears to be this—that if a receipt be given for the purpose of form, then the signing will not charge the person not receiving; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such receipt shall charge; and the true question in all these cases seems to have been, whether the money was under the control of both executors," Lord Redesdale in *Joy v. Campbell*, 1 Sch. & Lef. 341.

The rules respecting co-executors are equally applicable to co-administrators, *Willand v. Fenn*, cited in *Jacomb v. Harwood*, 2 Ves. 267.

Illustrations.

(1) An executor collusively sells the testator's goods at an under-value, when he might have obtained a higher price. This is *devastavit*, *Rice v. Gordon*, 11 Beav. 265.

(2) An executor applies the estate in undue expenses for the funeral of the testator. This is *devastavit*, *Stackpoole v. Stackpoole*, 4 Dow. 227

(3) An executor paid £100 to a physician who had attended on the testator without any fees for many years. The executor stated that the testator had promised to pay this sum to the physician. *Held*, the payment could not be allowed to the executor as the physician could not have claimed the sum as a legal debt, *Shallcross v. Wright*, 12 Beav. 505.

(4) An executor pays a debt proved to be justly due but which is barred by the law of limitation. This is not a *devastavit*, because an executor is not bound to plead limitation, *Norton v. Frecker*, 1 Atk 526 It would be a *devastavit* if the executor pays a debt which has been judicially declared to be barred by limitation, *Midgley v. Midgley*, (1893) 3 Ch. 282.

(5) An executor has a lease for years determinable on the life of A which is worth £200. The executor does not sell it but keeps it and A dies in a short time. This is *devastavit* and the executor must make up for the value, for it was his own fault that he would not sell it, *Phillips v. Phillips*, 2 Freem. 12; *Fry v. Fry*, 27 Beav. 144.

(6) A debt is payable on demand with interest. The executor does not pay it though he has sufficient funds and a decree is passed with interest and costs. This is *devastavit* for interest and costs, *Seaman v. Everard*. 2 Lev. 40.

(7) Goods of the testator are stolen from the possession of the executor or are lost by casualty by fire. The executor is not liable, *Croft v. Lyndsey*, 2 Freem. 1. The executors are not bound to insure or to continue the insurance of their testator, *Fry v. Fry*, 27 Beav. 146.

(8) An executor lends money on a bond, a promissory note, or other personal security. The security proves insufficient. The executor is liable unless the will empowers the executors to lend on personal securities, *Holmes v. Dring*, 1 Cox. 1

(9) A testator empowers his executors to lend money on personal security. One of the executors lends money to his co-executor on his personal security. This is a breach of trust and the executors will be liable, ——— *v. Walker*, 5 Russ. 7; *Gleadow v. Atkin*, 2 Cr. & J. 548.

(10) An executor allows a considerable portion of the assets of the testator unproductive in the hands of a banker. The banker fails. The executor will be personally liable, *Moyle v. Moyle*, 2 Russ. & M. 710.

NOTE.—With respect to losses sustained by the failure of bankers or other persons with whom the money is deposited the rule is that where the money is deposited by the

executor from necessity or from common usage the executor will not be responsible for the loss (*See Churchill v. Hobson*, 1 P. Wms 243 and other cases cited in the footnote (k) at p 1461. *Williams on Executors*, 10th Edn.).

(11) An executor pays the money of the testator into a banker's, not on any distinct account but mixes it with his own money. The banker fails. The executor will be liable for the loss, *Wren v. Kirton*, 11 Ves. 377.

(12) An executor pays the money of his testator into a banker's to his own account and mixes it with his own money. He afterwards draws out sums by cheque. The banker fails. The *cestui que trust* will have a charge on the full amount remaining in the hands of the banker in preference to the claim of the executor for his amount, *Re Hallett's Estate*, 13 C. D. 696.

(13) A, B, C, and D take out letters of administration. They afterwards appoint C to be acting administrator and direct the debtors to pay their debts to him. C becomes insolvent. A, B, and D will be liable for C's receipts, *Lees v. Sanderson*, 4 Sim. 82.

(14) A testator appoints A and B, his partners in business, his executors. A and B retain the testator's monies in the trade. The monies are lost. A and B will be personally liable, *Booth v. Booth*, 1 Beav. 125.

(15) A testator appoints A, B, and C his executors. A and B permit C to retain in his hands the residue of the estate. C absconds with the money. A and B will be liable, *Lincoln v. Wright*, 4 Beav. 427.

II. Personal Liability of an Executor or Administrator for continuing and carrying on the Trade of the Testator.—If the testator was a man of business and was carrying on the trade either alone or in partnership, the executor's duty is to wind the same up as soon as possible. Where the business is a valuable asset the executors are entitled to carry it on for such reasonable time as may be necessary to enable them to sell it as a going concern and also to an indemnity even as against creditors in respect of liabilities properly incurred in so doing, *Dowse v. Gorton*, (1891) A. C. 190. Beyond that the executors or administrators have no authority to carry on the trade and they run great risk even though the will contains a direction that they should continue the business of the deceased, *Jamsetji v. Hirji-bhai*, 37 Bom. 158; *Barker v. Barker*, 1 T. R. 295. When an executor carries on the business whether he does so for the purpose of winding it up or of making it over as a going concern to the person entitled to it, there does not appear to be any difference between his duties in so doing and his duties in dealing with any other part of the testator's estate. The responsibility rests entirely on him subject only to his ultimate right to be indemnified out of the estate, *Sudhir v. Gobinda*, 45 Cal. 538.

"The case of an executor or administrator in this respect is very hard: For if the trade be beneficial the profits are applicable to the purposes of the trust and the executor or administrator derives no personal benefit from the success. If on the contrary the trade proves a losing concern the executor, on failure of assets, will be personally responsible for the debts contracted in the business since the testator's death," *In re Oxley*, (1914) 1 Ch. 604.

When an executor carries on the business of his testator, whether authorized or unauthorized, and incurs debts, he will be personally liable to the creditors for debts contracted since the testator's death, *Labouchere v. Tupper*, 11 Moo. P. C. 198; *Debendra v. Hem Chandra*, 31 Cal. 253. If an executor without any authority take upon himself to trade with the assets, the testator's estate will not be liable.

The creditor's only remedy will be to proceed against the executor personally and the executor will be personally liable without any right of indemnity, *Kirkman v. Booth*, 11 Beav. 273. Even if the testator by his will direct his executor to carry on his business the executor will be personally liable for debts incurred by him in the business but he will be allowed to resort for his indemnity to the specific assets directed to be employed in the business, *In re Johnson*, L. R. 15 C. D. 548; *Ex-parte Garland*, 10 Ves. 110; *Re Kidd*, 70 L. T. 648. If no specific assets are directed to be employed in the business he shall have his indemnity out of the assets employed in the business at the time of the testator's death, *Jethabai v. Chotalal*, 34 Bom. 209. In carrying on the business it is incumbent on the executor to act with the same degree of care as a man of ordinary prudence would in his own affairs. Where he appoints an agent for him and it is shown that the executor was negligent both in the selection and supervision of the agent and the loss sustained by the estate can reasonably be connected with the want of such diligence, the loss must fall on the executor, *Lakhmichand v. Jai Kuvvarbai*, 29 Bom. 170. Where the testator empowers his executors to carry on the trade in the testator's name, the executors are not thereby empowered to embark upon any new enterprise so as to affect the rights of others derived under the will, but only to continue his business, *Sooleman v. Rahimtula*, 6 Bom. L. R. 800.

An administrator is only entitled to carry on the business of the intestate for the purpose of realization and if he does any more than this he renders himself personally liable for the debts so incurred without any right of indemnity out of the intestate's estate, *Re Evans*, 34 C. D. 597; *Re W. J. Cory*, (1903) P. 62.

The remedy of a creditor of the business for a debt incurred since the death of the testator or intestate is against the executor or administrator personally and not against the estate of the deceased, *Farhall v. Farhall*, L. R. 7 Ch. 123. But the creditor whose debt has been incurred since the deceased can make the executor render to him an account of the assets of the deceased which have been employed in the business since the death, *Thompson v. Dunn*, L. R. 5 Ch. 573. If the executors have an indemnity against the estate, i. e., if the will contains an authority to continue the business, then by subrogation the creditors of the executor have the right to proceed against the estate, and this in preference to the creditors of the deceased himself at the date of his death.

(See Snell's Principles of Equity, 15th Edn., pp. 137-141).

PART X.

Succession Certificates.

370. (1) A succession certificate (hereinafter in this Part referred to as a certificate) shall not be granted under this Part with respect to any debt or security to which a right is required by section 212 or section 213 to be established by letters of administration or probate :

Restriction on grant of certificates under this Part.

Provided that nothing contained in this section shall be deemed to prevent the grant of a certificate to any person claiming to be

entitled to the effects of a deceased Indian Christian, or to any part thereof, with respect to any debt or security, by reason that a right thereto can be established by letters of administration under this Act.

(2) For the purposes of this Part, "security" means—

- (a) any promissory note, debenture, stock or other security of the Government of India or of a Local Government;
- (b) any bond, debenture, or annuity charged by Act of Parliament on the revenues of India;
- (c) any stock or debenture of, or share in, a company or other incorporated institution;
- (d) any debenture or other security for money issued by, or on behalf of, a local authority;
- (e) any other security which the Governor General in Council may, by notification in the Gazette of India, declare to be a security for the purposes of this Part.

[Clause (1) is sec. 1 (4) of the Succession Certificate Act VII of 1889. The proviso is sec. 5 of the Native Christian Administration Act. Clause 2 is sec. 3 (2) of the Succession Certificate Act VII of 1889]

COMMENTARY.

The Preamble to the Succession Certificate Act VII of 1889 is as follows:—
 "Whereas it is expedient to facilitate the collection of debts on succession and afford protection to parties paying debts to the representatives of deceased person." The object, therefore, in re-enacting this part, to be borne in mind, is that the object of granting of certificate is only to facilitate the collection of debt and not enable the parties to litigate questions of disputed title, *Prankisto v. Nobodip*, 8 Cal. 868; the grant of certificate does not determine any question of title or decide what property does or does not belong to the estate of the deceased, *Gunindra v. Jugmala*, 30 Cal. 581; *Raja of Kalahasti v. Achigadu*, 17 M. L. J. 367; it merely enables the party to whom the certificate is granted to collect the assets belonging to the deceased, *Waselun Hug v. Gorchuroonissa*, 10 W. R. 105.

In case where more than one person applies for certificate, a joint certificate may be granted to both, if their interests are identical, *Narasimami v. Kuppusami*, 19 Mad. 497; though the Bombay High Court has held a contrary view, *Lanachand v. Uttamchand*, 15 Bom. 684. But if the interests of the claimants are not identical a joint certificate shall never be granted, nor should the Court give certificate to each claimant to enable him to collect the debts according to his share, but the Judge should exercise his discretion to grant the certificate to that person who shall appear to be best entitled, *Rani Raisunissa v. Rani Khujunissa*, 4 B. L. R. (a. c.) 149. In determining, the rig of the rival claimants, the Court should not enter on the determination of int

questions of law or of fact, but should issue a certificate to the person who has *prima facie* the clearest title to the succession and to leave the other to establish his title by a regular suit, *Surfogi v. Kamakshiamba*, 7 Mad. 452; *Jamnabai v. Hastubai*, 11 Bom. 179. Also, the Court should not inquire whether the debt is really due, *Kashi v. Parbhu*, 28 Bom. 119. It is also essential that the Court should hold some inquiry as to the right of the rival claimants to the certificate, *Balmakund v. Kundan*, 27 All. 452. In *Kalidas v. Bai Mahali*, 16 Bom. 712 the executors of the will of a Hindu, without proving the will, applied for certificate, which was opposed by the widow and the District Judge summarily rejected the application of the executors, but the High Court remanded the case. Therefore, on an application for certificate if a will is set up, the Court has jurisdiction to try the question whether or not there is a will, and the Court may determine an oral will, *Janki v. Kallu*, 31 All. 236; *Achutan v. Cheriotti*, 22 Mad. 9, and if the will is genuine and not coming under the provisions of the Hindu Wills Act, sec. 214 of this Act does not preclude the applicant from obtaining a certificate and the Court must grant the certificate, to the applicant, *Dave v. Bai Parvati*, 18 Bom. 608.

As to the necessity for a certificate see commentary to section 214. No decree will be passed against a debtor of a deceased person, unless the provisions of that section are complied with. If the suit is dismissed for non-compliance with the provisions of that section but if a certificate is produced before the Appeal Court, the case may be remanded, *Chullan Singh v. Madho Singh*, 19 C. W. N. 794.

371. The District Judge within whose jurisdiction the deceased ordinarily resided at the time of death, or, if at that time he had no fixed place of residence, the District Judge, within whose jurisdiction any part of the property of the deceased may be found, may grant a certificate under this Part.

Court having jurisdiction to grant certificate.

(This is sec. 5 of the Succession Certificate Act VII of 1889).

COMMENTARY.

When a Succession Certificate is to be granted.—As provided in sec. 214, "the Court shall not be bound to take into account the provisions of the Hindu Wills Act, a. 608. Subject following two

cases:—

(a) If the deceased at the time of his death resided within his jurisdiction, or, if at that time he had no fixed place of residence, the District Judge, within whose jurisdiction any part of the property of the deceased may be found, may grant a certificate under this Part.

(b) If the deceased had no fixed place of residence, he left property within his jurisdiction. It is in respect of assets in British India that the certificate is granted, *Mahim v. Ziaulnissa*, 12 Bom. 150. For further commentary, see sec. 270 of

372. (1) Application for such a certificate shall be made to the District Judge by a petition signed and verified by or on behalf of the applicant in the manner prescribed by the Code of Civil Procedure, 1908, for the signing and verification of a plaint by or on behalf of a plaintiff, and setting forth the following particulars, namely :—

Application for certificate.

- (a) the time of the death of the deceased ;
- (b) the ordinary residence of the deceased at the time of his death and, if such residence was not within the local limits of the jurisdiction of the Judge to whom the application is made, then the property of the deceased within those limits ;
- (c) the family or other near relatives of the deceased and their respective residences ;
- (d) the right in which the petitioner claims ;
- (e) the absence of any impediment under section 370 or under any other provision of this Act or any other enactment, to the grant of the certificate or to the validity thereof if it were granted ; and
- (f) the debts and securities in respect of which the certificate is applied for.

(2) If the petition contains any averment which the person verifying it knows or believes to be false, or does not believe to be true, that person shall be deemed to have committed an offence under section 198 of the Indian Penal Code.

(This is sec 6 of the Succession Certificate Act VII of 1939).

COMMENTARY.

Who can apply for Certificate.—Any person of sound mind and not a minor can apply for a certificate, provided he has an interest in the estate of the deceased. An executor of the will not governed by secs. 212, 213 of this Act can apply for certificate. He is not bound to take out probate, *Dare v. Bai Parvati*, 18 Bom. 608. As regards minors it has been held in several cases that a minor can apply for a certificate, through his guardian or by a next friend, but he must give security, *In re Mahadev*, 28 Bom. 344; *Ram Kuar v. Sardar Singh*, 20 All. 352; *Krishnamma v. Venkammah*, 36 Mad. 214; *In the goods of Seemarain Mahata*, 21 Cal. 911. See contra, *Gulabchand v. Moti*, 25 Bom. 523.

Contents of the Petition.—This section is similar to sec. 276 as regards the contents of the petition for probate or letters of administration. The petitioner must give the following particulars :—

- (a) Date of the death of the deceased.

- (b) Place of residence of the deceased or if the residence is not within the jurisdiction, the property of the deceased within the jurisdiction of the District Judge.
- (c) Next-of-kin of the deceased.
- (d) The right of the petitioner.
- (e) The absence of any impediment under sec. 370 of this Act.
- (f) The debt or security in respect of which the certificate is applied for.

373. (1) If the District Judge is satisfied that there is ground for entertaining the application, he shall fix a day for the hearing thereof and cause notice of the application and of the day fixed for the hearing—

Procedure on application

- (a) to be served on any person to whom, in the opinion of the Judge, special notice of the application should be given, and
- (b) to be posted on some conspicuous part of the court-house and published in such other manner, if any, as the Judge, subject to any rules made by the High Court in this behalf, thinks fit,

and upon the day fixed, or as soon thereafter as may be practicable, shall proceed to decide in a summary manner the right to the certificate.

(2) When the Judge decides the right thereto to belong to the applicant, the Judge shall make an order for the grant of the certificate to him.

(3) If the Judge cannot decide the right to the certificate without determining questions of law or fact which seem to him to be too intricate and difficult for determination in a summary proceeding, he may nevertheless grant a certificate to the applicant if he appears to be the person having *prima facie* the best title thereto.

(4) When there are more applicants than one for a certificate, and it appears to the Judge that more than one of such applicants are interested in the estate of the deceased, the Judge may, in deciding to whom the certificate is to be granted, have regard to the extent of interest and the fitness in other respects of the applicants.

(This is sec. 7 of the Succession Certificate Act VIII of 1857 with the alteration of the expression " District Court " into " District Judge ")

COMMENTARY.

Procedure.—This section lays down the procedure to be followed on the petition being filed; (see sec. 283).

On an application being filed there must be held an inquiry by the District Judge before the certificate is granted as to the right of the applicant to the certificate. The inquiry is to be a summary one, and when a judge has legal evidence before him on which he has come to a proper conclusion, his order will be final and his proceedings cannot be set aside because they do not seem to have been of a protracted nature, *Mussat Jigri Begum v. Syed Ali*, 5 C. W. N. 494; *Balmakund v. Kundan*, 2 A. L. J. 144; *Basanta v. Parbati*, 31 Cal. 133; *Dharmaya v. Sayana*, 21 Bom. 53; *Hurri Krishna v. Bal Bhadra*, 23 Cal. 431. All that the Court has to ascertain and decide is the right of the applicant to the certificate apart from any question as to the existence or non-existence of the debt, *Kushi v. Parbhu*, 28 Bom. 119. An application for a certificate by a daughter was opposed by a nephew of the deceased on the ground that the deceased was a member of the joint family. The District Judge granted the certificate to the daughter without going into the question of jointness. It was held on appeal that it was the duty of the District Judge to go into the question of jointness and he should not have granted the certificate to the daughter without going into that question, *Basanta v. Parbati*, 31 Cal. 133. If on an application for a certificate by an heir of the deceased a will is set up or an adoption is set up what the Judge has to determine is the right of the applicant to the certificate without waiting to decide the issue raised as to the genuineness of the will or the validity of the adoption, *Gulabchand v. Moti*, 25 Bom. 523; *Janki v. Kallu*, 31 All. 236. See on this subject sec. 370. What the applicant is required to show is his title to the certificate and if a *prima facie* case is made out the Court is bound to issue the certificate to the applicant, *Sivamma v. Subhamma*, 17 Mad. 477. If two persons claim the certificate adversely to each other a joint certificate may be granted, *Narayana Sami v. Kuppu Sami*, 19 Mad. 497. The Bombay High Court, however, has held that a joint certificate cannot be granted, *Lonachand v. Uttamchand*, 15 Bom. 584. It is not competent to the Court to grant a separate certificate to different persons for partial collection of debts, *Shitab Dei v. Debi Prasad*, 16 All. 21. See further on this subject as to whether a certificate can be granted for part of a debt at p. 239.

The decision of the District Judge under this section on summary inquiry does not in any way bar the right of the parties nor does it establish the right of the party to the debt to collect which the certificate is granted. See sec. 387. See *Mussat Jigri v. Syed Ali*, 5 C. W. N. 494.

374. When the District Judge grants a certificate, he shall therein specify the debts and securities set forth in the application for the certificate, and may thereby empower the person to whom the certificate is granted—

(a) to receive interest or dividends on, or

(b) to negotiate or transfer, or

(c) both to receive interest or dividends on, and to negotiate or transfer,

the securities or any of them.

[This is sec. 8 of the Succession Certificate Act VII of 1889 with the alteration the expression "District Court" into "District Judge".]

COMMENTARY.

The grant of certificate only entitles the applicant to recover the debt therein specified with interest or to negotiate or transfer the securities therein specified. See *Jai Dei v. Banwari Lal*, 35 All. 249.

375. (1) The District Judge shall in any case in which he proposes to proceed under sub-section (3) or sub-section (4) of section 373, and may, in any other case, require, as a condition precedent to the granting of a certificate, that the person to whom he proposes to make the grant shall give to the Judge a bond with one or more surety or sureties, or other sufficient security, for rendering an account of debts and securities received by him and for indemnity of persons who may be entitled to the whole or any part of those debts and securities.

Requisition of security from grantee of certificate.

(2) The Judge may, on application made by petition and on cause shown to his satisfaction, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as he thinks fit, assign the bond or other securities to some proper person, and that person shall thereupon be entitled to sue thereon in his own name as if it had been originally given to him instead of to the Judge of the Court, and to recover, as trustee for all persons interested, such amount as may be recoverable thereunder.

(This is sec. 3 of the Succession Certificate Act VII of 1889 with the alteration of the expression "District Court" into "District Judge").

COMMENTARY.

Administration Bond.—As in the case of grant of letters of administration so in the case of a grant of certificate the bond is necessary and it must be taken in the following cases:—

- (a) If the District Judge cannot decide the right to the certificate without determining questions of law or fact which seem to him to be too intricate, or
- (b) If there are more than one applicants and the grant is made to one under clause 4 of sec. 373.

This section leaves no discretion to the Court to dispense with the bond, *Rajain v. Edalapalle*, 11 M. L. T. 384; *Jai Dei v. Banwari*, 35 All. 249. In an order requiring security to be furnished the amount of the security and the time within which the same should be furnished must be mentioned, *Gulraji v. Jugedeo*, 28 All. 477.

376. (1) A District Judge may, on the application of the holder of a certificate under this Part, extend the certificate to any debt or security not originally specified therein, and every such extension shall

Extension of certificate.

have the same effect as if the debt or security to which the certificate is extended had been originally specified therein.

(2) Upon the extension of a certificate, powers with respect to the receiving of interest or dividends on, or the negotiation or transfer of, any security to which the certificate has been extended may be conferred, and a bond or further bond or other security for the purposes mentioned in section 375 may be required, in the same manner as upon the original grant of a certificate.

(This is sec. 10 of the Succession Certificate Act VII of 1889 with the alteration of the expression "District Court" into "District Judge").

COMMENTARY.

The extension of a certificate under this section to additional debt is not the grant of a certificate so as to give a right of appeal under sec. 384, *Venkateswarulu v. Brahmaravulu*, 25 Mad. 634. An order refusing an application to extend the certificate to any debt not specified is appealable, *Radha v Gopal*, 27 C. W. N. 947.

377. Certificates shall be granted and extensions of certificates shall be made, as nearly as circumstances admit, in the forms set forth in Schedule VIII.

Forms of certificate and extended certificate.

(This is sec. 11 of the Succession Certificate Act VII of 1889)

378. Where a District Judge has not conferred on the holder of a certificate any power with respect to a security specified in the certificate, or has only empowered him to receive interest or dividends on, or to negotiate or transfer, the security, the Judge may, on application made by petition and on cause shown to his satisfaction, amend the certificate by conferring any of the powers mentioned in section 374 or by substituting any one for any other of those powers.

Amendment of certificate in respect of powers as to securities

(This is sec. 12 of the Succession Certificate Act VII of 1889 with the alteration of the expression "District Court" into "District Judge").

379. (1) Every application for a certificate or for the extension of a certificate shall be accompanied by a deposit of a sum equal to the fee payable under the Court-fees Act, 1870, in respect of the certificate or extension applied for.

Mode of collecting Court-fees on certificates.

(2) If the application is allowed, the sum deposited by the applicant shall be expended, under the direction of the Judge, in the purchase of the stamp to be used for denoting the fee payable aforesaid.

(3) Any sum received under sub-section (1) and not expended under sub-section (2) shall be refunded to the person who deposited it.

(This is sec. 14 of the Succession Certificate Act VII of 1889).

COMMENTARY.

Refund of Deposit.—If the application is granted the sum deposited cannot be refunded; but if no order for grant is made, a refund may be made, *Sankara v. Nainar*, 21 Mad. 241.

Local extent of certificate.

380. A certificate under this Part shall have effect throughout the whole of British India.

(This is sec. 15 of the Succession Certificate Act VII of 1889).

381. Subject to the provisions of this Part, the certificate of the District Judge shall, with respect to the debts and securities specified therein, be conclusive as against the persons owing such debts or liable on such securities, and shall, notwithstanding any contravention of section 370, or other defect, afford full indemnity to all such persons as regards all payments made, or dealings had, in good faith in respect of such debts or securities to or with the person to whom the certificate was granted.

Effect of certificate

(This is sec. 10 of the Succession Certificate Act VII of 1889).

COMMENTARY.

Effect of Certificate.—The certificate is conclusive of the representative title of the holder thereof as against the debtors, *Wasselum Huq v. Gowhuroonissa*, 10 W. R. 105; *Azmal Ali v. Sitla Bux*, 9 A. L. J. 766; *Rupan Bibi v. Bhagelu Lal*, 36 All. 423, and it affords a full indemnity to all persons paying the debt and who are liable on the securities specified in the certificate, *Ex-parte Rau Narsinga*, 2 M. H. C. R. 164; it affords full indemnity to Banks under the Presidency Banks Act, *Ranjitsinghji v. The Bank of Bombay*, 45 Bom. 138. A suit for a declaration that the holder of the certificate is not the legal representative of the deceased will not lie, *Gauri v. Gayadin*, 4 All. 355.

The right conferred on the holder of the certificate is personal to the grantee and cannot be assigned, *Allah Dad v. Sant Ram*, 35 All. 74.

382. Where a certificate in the form, as nearly as circumstances admit, of Schedule VIII has been granted to a resident within a Foreign State by the British representative accredited to the State, or where a certificate so granted has been extended in such form by such representative, the certificate shall, when stamped in accordance with the provisions of the Court-fees Act, 1870, with

Effect of certificate granted or extended by British representative in Foreign State.

respect to certificates under this Part, have the same effect in British India as a certificate granted or extended under this Part.

(This is sec. 17 of the Succession Certificate Act VII of 1889).

COMMENTARY.

Grant by British Representatives.—A certificate granted by the Political Agent of a Native State must be recognised by the Civil Courts in British India. A District Judge cannot treat the certificate as invalid, because of irregularity in procedure in the grant by the Political Agent. These irregularities may be a reason for the Political Agent to cancel the grant, but they do not enable the District Court to treat it as a nullity, *Annapurnabai v. Lakshman*, 19 Bom. 145; *Arumuni v. Krishna*, 16 Mad. 405. A grant of probate by a Native State and a production of a certified copy thereof certified by the Political Agent is not sufficient, *Manasing v. Arad Kunhi*, 17 All. 14.

383. A certificate granted under this Part may be revoked for any of the following causes, namely —

Revocation of certificate

- (a) that the proceedings to obtain the certificate were defective in substance;
- (b) that the certificate was obtained fraudulently by the making of a false suggestion, or by the concealment from the Court of something material to the case;
- (c) that the certificate was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant thereof, though such allegation was made in ignorance or inadvertently;
- (d) that the certificate has become useless and inoperative through circumstances;
- (e) that a decree or order made by a competent Court in a suit or other proceeding with respect to effects comprising debts or securities specified in the certificate renders it proper that the certificate should be revoked.

(This is sec. 18 of the Succession Certificate Act VII of 1889).

COMMENTARY.

Revocation of certificate.—The causes enumerated in this section for revocation of the certificate are similar to the causes enumerated in section 263 for revocation of grant of probate or letters of administration and for detailed commentary, see p. 284. If a certificate is granted by a District Judge under a mistake of fact, it may be revoked, *Mancharam v. Kulid*, 19 Bom. 821. No suit will lie to set aside the certificate on the ground that the certificate was obtained by the use of false evidence, *Rupin Bibi v. Bhagelu Lal*, 36 All. 423.

384. (1) Subject to the other provisions of this Part, an appeal shall lie to the High Court from an order of a District Judge granting, refusing or revoking a certificate under this Part, and the High Court may, if it thinks fit, by its order on the appeal, declare the person to whom the certificate should be granted and direct the District Judge, on application being made therefor, to grant it accordingly, in supersession of the certificate, if any, already granted.

(2) An appeal under sub-section (1) must be preferred within the time allowed for an appeal under the Code of Civil Procedure, 1908.

(3) Subject to the provisions of sub-section (1) and to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908, as applied by section 141 of that Code, an order of a District Judge under this Part shall be final.

(This is sec. 19 of the Succession Certificate Act VII of 1889)

COMMENTARY.

Appeal.—An appeal shall lie to the High Court from an order of the District Judge granting, refusing or revoking a certificate. As to whether an appeal will lie from an order granting certificate conditional on security being given under sec. 375, the decisions are conflicting. In the following cases it was held that an order made under sec. 375, granting certificate conditional on the applicant giving security is not appealable, *In re Srimati*, 3 All. 304; *Bhagwanni v. Manni Lal*, 13 All. 214; *Nannhu v. Gulabo*, 26 All. 173; *Bai Devkore v. Lalchand*, 19 Bom. 790; *Ramma Reddi v. Papi Reddi*, 19 Mad. 199; *Rajamma v. Ramakrishnayya*, 29 Mad. 121; *Radha v. Brindaban*, 25 Cal. 320.

In *Ariya v. Thangammal*, 20 Mad. 442, it was held that an appeal would lie. The Bombay High Court in *Bai Nandkore v. Sha Maganlal*, 36 Bom. 272, has held that an order granting a certificate accompanied by a condition that security should be furnished is appealable; but an order directing that a certificate should not be granted unless security is furnished is not appealable. In the case of *Bindo v. Radhe Lal*, 42 All. 512, a certificate was granted *ex-parte* to the widow of the deceased; subsequently the brother of the deceased appealed and contended that no notice was given to him of the widow's application and he preferred an appeal from the order granting the certificate. It was contended on behalf of the widow that no appeal lay and that the appellant should first apply for revocation of the grant. It was held that it was not necessary to file an application for revocation and that the appeal was proper.

No appeal lies against an order as to security on the ground that the security is inadequate, *Lucas v. Lucas*, 20 Cal. 245; see also, *Monmohinee v. Khetlee*, 1 Cal. 127.

An appeal lies from an order refusing to grant a certificate of heirship under Reg. VIII of 1827, *Rangubai v. Abaji*, 19 Bom. 399; *Javermal v. The Nazir of the District Court of Poona*, 18 Bom. 748.

Second Appeal.—There is no scope for second appeal under this section, *Subba Rao v. Palaniandi*, 17 Mad. 167.

385. Save as provided by this Act, a certificate granted thereunder in respect of any of the effects of a deceased person shall be invalid if there has been a previous grant of such a certificate or of probate or letters of administration in respect of the estate of the deceased person and if such previous grant is in force.

Effect on certificate of previous certificate, probate or letters of administration.

(This is sec. 20 of the Succession Certificate Act VII of 1889).

COMMENTARY.

Invalidity of the Certificate.—A certificate granted under this part is invalid in the following cases :—

- (a) If a certificate in respect of the same debt has already been previously granted.
- (b) If a probate has been previously granted and is in force.
- (c) If letters of administration have been previously granted and are in force.

A certificate cannot be granted of a part of the debt, *Shamsh-un-Nissa v. Wajid Ali*, (1890) A. W. N. 91 (see p. 239). As to the effect of payments made under a certificate which is invalid, they would, it is submitted, stand on the same footing as payments made under a void grant of probate or letters (see p. 312 *supra*) see also sec. 386, which validates payment in ignorance under an invalid or superseded certificate.

386. Where a certificate under this Part has been superseded or is invalid by reason of the certificate having been revoked under section 383, or by reason of the grant of a certificate to a person named in an appellate order under section 384, or by reason of a certificate having been previously granted, or for any other cause, all payments made, or dealings had, as regards debts and securities specified in the superseded or invalid certificate, to or with the holder of that certificate, in ignorance of its supersession or invalidity, shall be held good against claims under any other certificate.

Validation of certain payments made in good faith to holder of invalid certificate.

(This is sec. 22 of the Succession Certificate Act VII of 1889).

COMMENTARY.

This section is similar to sec. 215 (Proviso). If a certificate is revoked under sec. 383 or on appeal under sec. 384 or by reason of a certificate already granted or

for any other cause the payments made to the holder will discharge the debtor, provided he has no notice of the invalidity or supersession of the certificate and acts in good faith.

387. No decision under this Part upon any question of right between any parties shall be held to bar the trial of the same question in any suit or in any other proceeding between the same parties, and nothing in this Part shall be construed to affect the liability of any person who may receive the whole or any part of any debt or security, or any interest or dividend on any security, to account therefor to the person lawfully entitled thereto.

Effect of decisions under this Act, and liability of holder of certificate thereunder.

(This is sec. 25 of the Succession Certificate Act VII of 1889).

COMMENTARY.

As seen in sec. 373, the inquiry is summary. Therefore an aggrieved party has his remedy in a civil action to establish his right under this section.

Investiture of inferior Courts with jurisdiction of District Court for purposes of this Act

388. (1) The Local Government may, by notification in the local official Gazette, invest any Court inferior in grade to a District Judge with power to exercise the functions of a District Judge under this Part.

(2) Any inferior Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Judge in the exercise of all the powers conferred by this Part upon the District Judge, and the provisions of this Part relating to the District Judge shall apply to such an inferior Court as if it were a District Judge :

Provided that an appeal from any such order of an inferior Court as is mentioned in sub-section (1) of section 384 shall lie to the District Judge and not to the High Court, and that the District Judge may if he thinks fit, by his order on the appeal, make any such declaration and direction as that sub-section authorises the High Court to make by its order on an appeal from an order of a District Judge.

(3) An order of a District Judge on an appeal from an order of an inferior Court under the last foregoing sub-section shall, subject to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Procedure, 1908, as applied by section 141 of that Code, be final.

(4) The District Judge may withdraw any proceedings under this Part from an inferior Court and may either himself dispose of

them or transfer them to another such Court established within the local limits of the jurisdiction of the District Judge and having authority to dispose of the proceedings.

(5) A notification under sub-section (1) may specify any inferior Court specially or any class of such Courts in any local area.

(6) Any Civil Court which for any of the purposes of any enactment is subordinate to, or subject to the control of, a District Judge shall for the purposes of this section be deemed to be a Court inferior in grade to a District Judge.

(This is sec. 26 of the Succession Certificate Act VII of 1889).

COMMENTARY.

This section confers on the District Court the same appellate jurisdiction over an order of an inferior Court as is conferred on the High Court under sec. 384 over the order of a District Court. There is no provision for second appeal, *Subba Rao v. Palaniandi*, 17 Mad. 167.

As to the powers conferred on the Subordinate Judge, he has all the powers of the District Judge; he has jurisdiction to hear and determine an application under section 2 of Regulation VIII of 1827, *Pitambar v. Ishwar*, 17 Bom. 230. If a certificate is granted by the Subordinate Judge its revocation must be made before him and not to the District Judge, *Sukhia v. Secretary of State*, 19 C. W. N. 554.

389. (1) When a certificate under this Part has been superseded or is invalid from any of the causes mentioned in section 386, the holder thereof shall, on the requisition of the Court which granted it, deliver it up to that Court.

Surrender of superseded and invalid certificates.

(2) If he wilfully and without reasonable cause omits so to deliver it up, he shall be punishable with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to three months, or with both.

(This is sec. 27 of the Succession Certificate Act VII of 1889)

390. Notwithstanding anything in Bombay Regulation

Provisions with respect to certificates under Bombay Regulation VIII of 1827.

No. VIII of 1827, the provisions of section 370, sub-section (2), section 372, sub-section (1), clause (f), and sections 374, 375, 376, 377, 378, 379, 381, 383, 384, 387, 388 and 389 with respect to certificates under this Part and applications therefor, and of section 317 with respect to the exhibition of inventories and accounts by executors and administrators, shall, so far as they can be ma

applicable, apply, respectively, to certificates granted under that Regulation, and applications made for certificates thereunder, after the 1st day of May, 1889, and to the exhibition of inventories and accounts by the holders of such certificates so granted.

(*This is sec. 28 of the Succession Certificate Act VII of 1889*).

PART XI.

Miscellaneous.

391. Nothing in Part VIII, Part IX or
Saving Part X shall—

- (i) validate any testamentary disposition which would otherwise have been invalid;
- (ii) invalidate any such disposition which would otherwise have been valid;
- (iii) deprive any person of any right of maintenance to which he would otherwise have been entitled; or
- (iv) affect the Administrator General's Act, 1913.

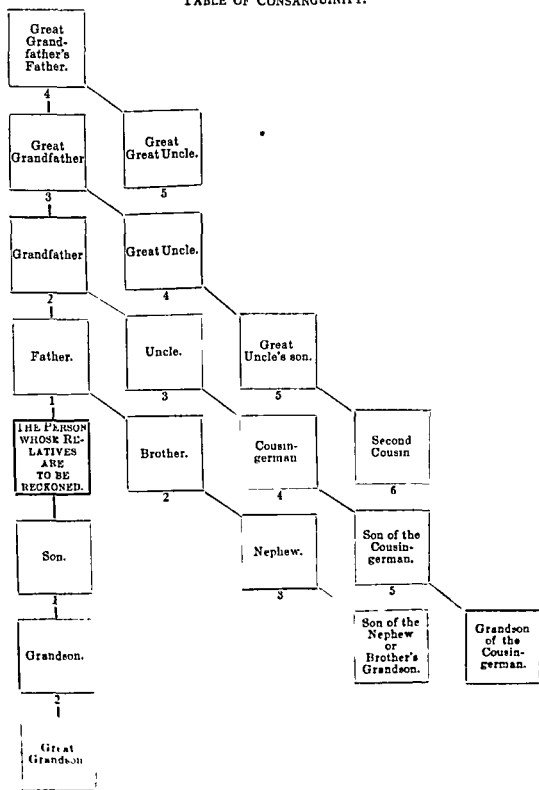
(*This is sec. 149 of the Probate and Administration Act V of 1881*).

392. The enactments mentioned in Schedule IX are hereby
Repeals. repealed to the extent specified in the third column thereof.

SCHEDULE I.

(See section 28).

TABLE OF CONSANGUINITY.



SCHEDULE II.

PART I.

(See section 55).

(1) Brothers and sisters, and the children or lineal descendants of such of them as shall have predeceased the intestate.

(2) Grandfather and grandmother.

(3) Grandfather's sons and daughters, and the lineal descendants of such of them as have predeceased the intestate.

(4) Great-grandfather and great-grandmother.

(5) Great-grandfather's sons and daughters and the lineal descendants of such of them as have predeceased the intestate.

PART II.

(See section 56).

(1) Father and mother.

(2) Brothers and sisters and the lineal descendants of such of them as have predeceased the intestate.

(3) Paternal grandfather and paternal grandmother.

(4) Children of the paternal grandfather, and the lineal descendants of such of them as have predeceased the intestate.

(5) Paternal grandfather's father and mother.

(6) Paternal grandfather's father's children and the lineal descendants of such of them as have predeceased the intestate.

(7) Brothers and sisters by the mother's side and the lineal descendants of such of them as have predeceased the intestate.

(8) Maternal grandfather and maternal grandmother.

(9) Children of the maternal grandfather, and the lineal descendants of such of them as have predeceased the intestate.

(10) Son's widow, if she has not re-married at or before the death of the intestate.

(11) Brother's widow, if she has not re-married at or before the death of the intestate.

(12) Paternal grandfather's son's widow, if she has not re-married at or before the death of the intestate.

(13) Maternal grandfather's son's widow, if she has not re-married at or before the death of the intestate.

(14) Widowers of the intestate's deceased daughters if they have not re-married at or before the death of the intestate.

(15) Maternal grandfather's father and mother.

(16) Children of the maternal grandfather's father, and the lineal descendants of such of them as have predeceased the intestate.

(17) Paternal grandmother's father and mother.

(18) Children of the paternal grandmother's father, and the lineal descendants of such of them as have predeceased the intestate.

SCHEDULE III.

(See section 57).

PROVISIONS OF PART VI APPLICABLE TO CERTAIN WILLS AND CODICILS DESCRIBED IN SECTION 57.

Sections 59, 61, 62, 63, 64, 68, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 95, 96, 98, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, and 190.

Restrictions and modifications in application of foregoing sections.

1. Nothing therein contained shall authorise a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance of which, but for the application of these sections, he could not deprive them by will.

2. Nothing therein contained shall authorise any Hindu, Buddhist, Sikh or Jaina, to create in property any interest which he could not have created before the first day of September, 1870.

3. Nothing therein contained shall affect any law of adoption or intestate succession.

4. In applying section 70 the words "than by marriage or" shall be omitted.

5. In applying any of the following sections, namely, sections seventy-five, seventy-six, one hundred and five, one hundred and nine, one hundred and eleven, one hundred and twelve, one hundred and thirteen, one hundred and fourteen, one hundred and fifteen, and one hundred and sixteen to such wills and codicils the words "son," "sons," "child," and "children" shall be deemed to include an adopted child; and the word "grand-children" shall be deemed to include the children, whether adopted or natural-born, of a child whether adopted or natural-born; and expression "daughter-in-law" shall be deemed to include the wife of an adopt

SCHEDULE IV.

[See section 274 (2).]

FORM OF CERTIFICATE.

I, A. B., Registrar (or as the case may be) of the High Court of judi-
 cature at _____ (or as the case may be) hereby certify
 that on the _____ day of _____, the High
 Court of Judicature at _____ (or as the case may be)
 granted probate of the will (or letters of administration of the estate) of
 C. D., late of _____, deceased, to E. F. of _____
 and G. H. of _____, and that such probate (or letters) has (or have)
 effect over all the property of the deceased throughout the whole of British India.

SCHEDULE V.

[See section 284 (4).]

FORM OF CAVEAT.

Let nothing be done in the matter of the estate of A. B., late of _____,
 deceased, who died on the _____ day of _____ at _____,
 without notice to C. D. of _____.

SCHEDULE VI.

(See section 289).

FORM OF PROBATE.

I, _____, Judge of the District of _____ [or Delegate
 appointed for granting probate or letters of administration in (here insert
 the limits of the Delegate's jurisdiction)], hereby make known that on the
 _____ day of _____ in the year _____,
 the last will of _____, late of _____, a copy whereof
 is hereunto annexed, was proved and registered before me, and that admi-
 nistration of the property and credits of the said deceased, and in any way
 concerning his will was granted to _____, the executor in the said
 will named, he having undertaken to administer the same, and to make a full and
 true inventory of the said property and credits and exhibit the same in this Court
 within six months from the date of this grant or within such further time as the
 Court may, from time to time, appoint, and also to render to this Court a true
 account of the said property and credits within one year from the same date, or
 within such further time as the Court may, from time to time, appoint.

SCHEDULE VII.

(See section 200).

FORM OF LETTERS OF ADMINISTRATION.

I, _____, Judge of the District of _____ [or Delegate appointed for granting probate or letters of administration in (*here insert the limits of the Delegate's jurisdiction*)], hereby make known that on the _____ day of _____ letters of administration (with or without the will annexed, as the case may be), of the property and credits of _____ late of _____, deceased, were granted to _____, *the father* (or as the case may be) of the deceased, he having undertaken to administer the same and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may, from time to time, appoint, and also to render to this Court a true account of the said property and credits within one year from the same date, or within such further time as the Court may, from time to time, appoint.

SCHEDULE VIII.

(See section 377).

FORMS OF CERTIFICATE AND EXTENDED CERTIFICATE.

In the Court of _____

To A. B.

Whereas you applied on the _____ day of _____ for a certificate under Part X of the Indian Succession Act, 1925, in respect of the following debts and securities, namely :—

Debts.

Serial number.	Name of debtor.	Amount of debt, including interest, on date of application for certificate.	Description and date of instrument, if any, by which the debt is secured.

Securities.

Serial number.	DESCRIPTION.			Market-value of security on date of application for certificate.
	Distinguishing number or letter of security.	Name, title or class of security.	Amount or par value of security.	

This certificate is accordingly granted to you and empowers you to collect those debts [and] [to receive] [interest] [dividends] [on] [to negotiate] [to transfer] [those securities].

Dated this

day of

District Judge.

In the Court of

On the application of *A. B.* made to me on the day of ,
I hereby extend this certificate to the following debts and securities, namely:—

Debts.

Serial number.	Name of debtor.	Amount of debt, including interest, on date of application for extension.	Description and date of instrument, if any, by which the debt is secured.

Securities.

Serial number.	DESCRIPTION.			Market-value of security on date of application for extension.
	Distinguishing number or letter of security.	Name, title or class of security.	Amount or par value of security.	

This extension empowers *A. B.* to collect those debts [and] [to receive] [interest] [dividends] [on] [to negotiate] [to transfer] [those securities].

Dated this

day of

District Judge.

SCHEDULE IX.

(See section 302).

ENACTMENTS REPEALED.

Number and Year.	Short title.	Extent of repeal.
XIX of 1841	... The Succession (Property Protection) Act, 1841.	So much as has not already been repealed.
X of 1865	... The Indian Succession Act, 1865.	So much as has not already been repealed.
XXI of 1865	... The Parsi Intestate Succession Act, 1865.	The whole Act.
XXI of 1870	... The Hindu Wills Act, 1870.	So much as has not already been repealed.
III of 1874	... The Married Woman's Property Act, 1874.	The last paragraph of section 2.
V of 1881	... The Probate and Administration Act, 1881.	So much as has not already been repealed.
VI of 1881	... The District Delegates Act, 1881.	The whole Act.
VI of 1889	... The Probate and Administration Act, 1889.	So much as has not already been repealed.
VII of 1889	... The Succession Certificate Act, 1889.	So much as is unrepealed, except section 13.
II of 1890	... The Probate and Administration Act, 1890.	So much as has not already been repealed.
VII of 1901	... The Native Christian Administration of Estates Act, 1901.	So much as has not already been repealed.
VIII of 1903	... The Probate and Administration Act, 1903.	So much as has not already been repealed.
XXVIII of 1919	... The Repealing and Amending Act, 1919.	So much of Schedule I as refers to Act X of 1865 or to Act V of 1881.
XXXVIII of 1920	... The Devolution Act, 1920.	So much of Schedule I as refers to Act X of 1865 or to Act V of 1881.

L. GRAHAM,

Secy. to the Govt. of India

APPENDIX I.

ON PROBATE DUTY.

I. Probate Duty in case of Probate and Letters of Administration.

CLAUSES 2, AND 3 OF ART. II OF THE COURT FEES ACT VII OF 1870 ARE
REPEALED AND THE FOLLOWING SUBSTITUTED BY ACT VII OF 1910.

II. Probate of a
will or letters of ad-
ministration with or
without will, annexed.

When the amount
or value of the pro-
perty in respect of
which the grant of
probate or letters is
made exceeds one
thousand rupees, but
does not exceed ten
thousand rupees.

Two per centum
on such amo-
unt or value.

When such amount
or value exceeds ten
thousand rupees, but
does not exceed fifty
thousand rupees.

Two and one-half
per centum on
such amount
or value.

When such amount
or value exceeds fifty
thousand rupees:

Three per centum
on such amo-
unt or value.

[ADD FOR BENGAL].

When the amount
or value of the
property in respect of
which the grant of
probate or letters is
made exceeds two
thousand rupees, but
does not exceed ten
thousand rupees,

Two per centum
on such amo-
unt or value.

and

When such amount
or value exceeds ten
thousand rupees, but
does not exceed fifty
thousand rupees, for
the portion of such
amount or value

Three per cen-
tum on such
amount or
value.

11. Probate, etc.
—(contd).

which is in excess of
ten thousand rupees,

and

When such amount
or value exceeds fifty
thousand rupees, but
does not exceed a
lakh of rupees for the
portion of such
amount or value
which is in excess of
fifty thousand rupees,

Four per centum
on such amo-
unt or value.

and

When such amount
or value exceeds a
lakh of rupees for the
portion of such
amount or value
which is in excess of
a lakh of rupees.

Five per centum
on such amo-
unt or value.

Provided that, when, after the grant of a certificate under the Succession Certificate Act, 1889, or under the Regulation of the Bombay Code, No. VIII of 1827, in respect of any property included in an estate, a grant of probate or letters of administration is made in respect of the same estate, the fee payable in respect of the latter grant shall be reduced by the amount of fee paid in respect of the former grant.

COMMENTARY.

The expression "the amount or value of the property" in the above article refers only to the net value; when, therefore, the property is mortgaged, the value is the value of the equity of redemption, *In re Ramchandra*, 1 Bom. 118, and if the mortgage amount is in excess of the value of the property, no fee will be payable. If the property is subject to the payment of an annuity, the duty payable will be on the value of the property less the capitalized value of the annuity, *In the goods of Rushton*, 3 Cal. 736, and in case of an annuity, the probate duty payable thereon is the market value of the annuity and not ten times the annual payment, *In re Ramchandra*, 1 Bom. 118.

Under sec. 191 of the Court Fees Act, it is requisite in cases of application for grant of probate and letters of administration to state the value of the property left by the deceased. The petitioner has to state in Schedule A the valuation of the moveable and immoveable property left by the deceased. The petitioner is also required to state in Schedule B to the petition the debts, etc., left by the

The Schedule III referred to in sec. 191 is as follows :—

FORM OF VALUATION (TO BE USED WITH SUCH MODIFICATIONS, IF ANY,
AS MAY BE NECESSARY).

IN THE COURT OF

Re Probate of the Will of
Property and Credits of

(*or Administration of the*
), deceased.

I

{ solemnly affirm }
{ make oath }

and say that I am the executor (*or one of the executors, or one of the next-of-kin*) of _____, deceased, and that I have truly set forth in Annexure A to this affidavit all the property and credits of which the above-named deceased died possessed or was entitled to at the time of his death, and which have come, or are likely to come, to my hands.

2. I further say that I have also truly set forth in Annexure B all the items I am by law allowed to deduct.

3. I further say that the said assets, exclusive only of such last-mentioned items, but inclusive of all rents, interest, dividends and increased values since the date of the death of the said deceased, are under the value of

ANNEXURE A.

VALUATION OF THE MOVEABLE AND IMMOVEABLE PROPERTY
OF _____, DECEASED.

Cash in the house and at the banks, household goods, wearing apparel, books, plate, jewels, &c.

(*State estimated value according to best of Executor's or Administrator's belief.*)

Property in Government securities transferable at the Public Debt Office.

(*State description and value at the price of the day; also the interest, separately calculating it to the time of making the application.*)

Immoveable property, consisting of

(*State description, giving, in the case of houses, the assessed value, if any, and the number of years' assessment the market-value is estimated at, and, in the case of land, the area, the market-value, and all rents that have accrued.*)

Rs. A. P.

ANNEXURE A—(continued).

	Rs.	A.	P.
Leasehold property			
<i>(If the deceased held any leases for years determinable, state the number of years' purchase the profit rents are estimated to be worth, and the value of such, inserting separately arrears due at the date of death, and all rents received or due since that date to the time of making the application.)</i>			
Property in public companies			
<i>(State the particulars and the value calculated at the price of the day; also the interest separately, calculating it to the time of making the application.)</i>			
Policy of insurance upon life, money out on mortgage and other securities, such as bonds, mortgages, bills, notes, and other securities for money.			
<i>(State the amount of the whole; also the interest separately, calculating it to the time of making the application.)</i>			
Book debts			
<i>(Other than bad.)</i>			
Stock in trade			
<i>(State the estimated value, if any.)</i>			
Other property not comprised under the foregoing heads ...			
<i>(State the estimated value, if any.)</i>			
Total ...			
Deduct amount shown in Annexure B not subject to duty ...			
NET TOTAL ...			
ANNEXURE B.			
SCHEDULE OF DEBTS, &c.			
Amount of debts due and owing from the deceased, payable by law out of the estate.			
Amount of funeral expenses			
Amount of mortgage-incumbrances			
Property held in trust not beneficially or with general power to confer a beneficial interest.			
Other property not subject to duty			
TOTAL ...			

Accordingly the duty payable is on the value of the moveable and immoveable property, such valuation to be made as of the date of the petition and not the date of the death of the deceased, plus the rent, interest, and dividends between the date of death and the date of petition less the amount in Annexure B, see *In the goods of Harriett*, 18 C. L. J. 308.

In case where the assets are not reduced into possession at the time of taking out probate or letters of administration and the right to it is the subject of a suit, it was held that it was permissible to declare the value of that asset or property as not exceeding Rs. 1,000 and to pay the proper duty on recovery of the assets, *In the goods of Abdool Aziz*, 23 Cal. 577; but this case, has not been followed in the Bombay High Court and Mr. Justice Coyaji required the petitioner to state the full value of the property and to pay the full duty thereon and to claim a refund if the assets were not recovered or recovered less. Also mere uncertainty of the recovery of a debt due to the estate of the deceased is not a sufficient ground for a reduction of fee, *In the goods of Rarnchander Ghose*, 24 Cal. 567. It is also to be remembered that the duty payable is only on the assets in British India, and in the Annexure A the property required to be stated are these in British India only, *In re Ezekiel*, 21 Bom. 139. Property in foreign country and in the Native States is not required to be valued or mentioned.

If according to foreign law, a testator cannot will away the whole property, probate duty is payable on the bequeathable portion only. *In the goods of Foreschrinn*, 20 Cal. 575, a question arose, that as according to the law by which the deceased was governed, the husband and wife took an equal interest in the property and that on the death of one, the survivor was entitled to the half, whether duty should be levied on the whole or the half and it was held that one-half of the property was chargeable with duty. It is submitted that similarly in the case of a Mahomedan as he can only will away a third of his property the duty would be chargeable on the third and not on the whole. *In the goods of Gladstone*, 1 Cal. 168, a testator who had a share in a firm in Calcutta died in London. Probate was granted in London and the share was valued and duty paid in London. Subsequently the Calcutta concern was sold and an application for grant of probate was made in Calcutta to enable the executor to join in the conveyance and an exemption from payment of duty was asked for on the ground that duty had already been paid in London; it was held that the executor was not entitled to exemption. In the case of the share of a partner in a firm, if the head office of the firm is beyond British India, the share of the partner in British India is not subject to probate duty, *In re A. A. D. Sassoon*, 21 Bom. 673. In cases of this kind the question is, "Where is the Government of the firm"? If in British India, it is liable, if it is not, it is not liable.

In case of a property over which the testator has a general power of appointment, probate duty must be paid, *In re Lakshminarayana Ammal*, 25 Mad. 515; but no duty is payable on a property over which the testator had a special power of appointment, even if he executed that power by a will, *Drake v. Att.-General*, 10 Cl. & F. 257 (Coote's Probate Practice, 15th Edn., p. 977).

From What Fund Probate Duty should be paid.—The fund primarily liable for the payment of the probate duty is the residuary estate, *Dayabhai v. Damodardas*, 21 Bom. 75.

Exemption from Payment of Probate Duty.—(a) Under section 19 of the Court Fees Act, Clause VIII, when the amount or value of the property in respect of which the probate or the letters of administration shall be granted does not exceed one thousand rupees (in Bengal two thousand rupees) no duty is payable.

The duty is only payable under the Court Fees Act if the assets exceed Rs. 1,000, *In the goods of Mrs. E. E. Meik*, 40 All. 279. When the gross value exceeds Rs. 1,000 but the net value after deducting the debts and liabilities is less than Rs. 1,000, it was held in *The Collector of Maldah v. Nirode Kamini*, 17 C. W. N. 21 that duty is payable.

(b) No probate duty is payable on property which the testator held as a trustee. (See sec. 19 D. of the Court Fees Act at p. 398). Property over which the testator had a special power of appointment, even though it be exercisable by will is considered trust property, *Drake v. Att.-General*, 10 Cl. & F. 257, see also, *In the goods of W. G. Chalmers*, 6 B. L. R. 137 app.; *In the goods of George*, 6 B. L. R. 138 app.; *In re Lakshminarayana*, 25 Mad. 515.

(c) No duty is payable if on the expiry of the first grant, a double grant is made in respect of the same property even though the scale of fees may have been increased, *Swarnamoyee v. Secretary of State*, 20 C. W. N. 472. But if at the time of the first grant probate duty was not paid, it would become payable on the subsequent grant, *In re Malcolm Gasper*, 2 C. H. C. R. 436.

(d) As regards Hindu joint family property it was held in the recent full bench case by the Bombay High Court that shares of public companies standing in the name of the father are exempt from probate duty, *Keshavlal v. The Collector of Ahmedabad*, 48 Bom. 75, see also *Collector of Kaira v. Chunilal*, 29 Bom. 161; *Collector of Ahmedabad v. Surchand*, 27 Bom. 140; *Kashinath v. Gouravabai*, 39 Bom. 245. The Madras High Court in the case of *In re Dasa Manavala*, 33 Mad. 93 (F. B.) has, however, held that if a surviving co-parcener governed by the Mitakshara law applies for letters of administration in respect of property standing in the name of a deceased co-parcener which is joint family property of the applicant and the deceased he is bound to pay the probate duty. The Calcutta High Court in the recent case of *In the goods of Bhuvaneshwar*, 29 C. W. N. 372, held that where an application for letters of administration is made to the estate of a deceased Hindu governed by the Mitakshara law the provisions of sec. 19I must be complied with and *ad valorem* duty should be paid. In the case of *In the goods of Polurmull Augurmullah*, 23 Cal. 980, it was, however, held that where a property was purchased by four brothers, members of an undivided Hindu family, out of the joint ancestral estate and the property was conveyed to them as tenants-in-common and one of the brothers died leaving a will, the property was exempt from probate duty.

II. Probate Duty in case of Certificate under the Succession Certificate Act (now under Part X of this Act).

[Not for Bengal.]

Two per centum on the amount or value of any debt or security specified in the certificate under S. 8 of the Act, and three per centum on the amount or value of any debt or security to which the certificate is extended under S. 10 of the Act.

NOTE.—(1) The amount of a debt is its amount, including interest on the day on which the inclusion of the debt in the certificate is applied for, so far as such amount can be ascertained.

12. Certificate under the Succession Certificate Act, 1889.

[Not for Bengal.]
In any case.

(2) Whether or not any power with respect to a security specified in a certificate has been conferred under the Act and where such a power has been so conferred, whether the power is for the receiving of interest or dividends on, or for the negotiation or transfer of the security, or for both purposes, the value of the security is its market-value on the day on which the inclusion of the security in the certificate is applied for, so far as such value can be ascertained.

[For Bengal Add
When the
amount or value
of any debt or

[For Bengal
Two per centum on such
amount or value and three
per centum on the amo-

security specified in the certificate under S. 8 of the Act exceeds one thousand rupees but does not exceed ten thousand rupees,

and

When such amount or value exceeds ten thousand rupees, but does not exceed fifty thousand rupees, for the portion of such amount or value which is in excess of ten thousand rupees,

and

When such amount or value exceeds fifty thousand rupees, but does not exceed a lakh of rupees for the portion of such amount or value which is in excess of fifty thousand rupees,

and

When such amount or value exceeds a lakh of rupees for the portion of such amount or value which is in excess of a lakh of rupees.]

unt or value of any debt or security to which the certificate is extended under S. 10 of the Act.

Three per centum on such amount or value and four-and-a-half per centum on the amount or value of any debt or security to which the certificate is extended under S. 10 of the Act.

Four per centum on such amount or value and six per centum on the amount or value of any debt or security to which the certificate is extended under S. 10 of the Act.

Five per centum on such amount or value and seven-and-a-half per centum on the amount or value of any debt or security to which the certificate is extended under S. 10 of the Act.

12. Certificate,
etc.—(*concl'd*).

COMMENTARY.

This article was substituted by the Succession Certificate Act, section 13, which has not been repealed by the Succession Act of 1925.

Duty is payable only on the amount of debt mentioned in the certificate, *In re Haji Ismail Haji Abdoola*, 6 Bom. 452. If a part of the debt is already paid, duty is payable on the undischarged portion, *Muhammad v. Puttan Bibi*, 19 All. 129. When a fresh certificate is applied for to collect a debt in respect of which a certificate had already been granted and duty paid fresh duty is payable, *In re Saraje Bashini*, 20 C. W. N. 1125.

III. Probate Duty in case of Certificate Under Reg. VIII of 1827.

12-A. Certificate under the Regulation of the Bombay Code, No. VIII of 1827.

(1) As regards debts and securities.

The same fee as would be payable in respect of a certificate under the Succession Certificate Act, 1889, or in respect of an extension of such a certificate, as the case may be.

(2) As regards other property in respect of which the certificate is granted—

When the amount or value of such property exceeds one thousand rupees, but does not exceed ten thousand rupees;

Two per centum on such amount or value.

When such amount or value exceeds ten thousand rupees; but does not exceed fifty thousand rupees;

Two and one-half per centum on such amount or value.

When such amount or value exceeds fifty thousand rupees.

Three per centum on such amount or value.

CHAPTER IIIA* OF THE COURT FEES ACT.

PROBATES, LETTERS OF ADMINISTRATION, AND CERTIFICATES
OF ADMINISTRATION.

19A. Where any person, on applying for the probate of a will or letters of administration, has estimated the property of the deceased to be of greater value than the same has afterwards proved to be, and has consequently paid too high a court-fee thereon, if, within six months after the true value of the property has been ascertained, such person produces the probate or letters to the Chief Controlling Revenue Authority "for the local area" † in which the probate or letters has or have been granted,

Relief where too high a court-fee has been paid.

and delivers to such Authority a particular inventory and valuation of the property of the deceased, verified by affidavit or affirmation,

and if such Authority is satisfied that a greater fee was paid on the probate or letters than the law required,

the said Authority may—

(a) cancel the stamp on the probate or letters, if such stamp has not been already cancelled ;

(b) substitute another stamp for denoting the court-fee which should have been paid thereon ; and

(c) make an allowance for the difference between them as in the case of spoiled stamps, or repay the same in money, at his discretion.

19B. Whenever it is proved to the satisfaction of such Authority that an executor or administrator has paid debts due from the deceased to such an amount as, being deducted out of the amount or value of the estate, reduces the same to a sum which, if it had been the whole gross amount or value of the estate, would have occasioned a less court-fee to be paid on the probate or letters of administration granted in respect of such estate than has been actually paid thereon under this Act,

Relief where debts due from a deceased person have been paid out of his estate

such Authority may return the difference, provided the same be claimed within three years after the date of such probate or letters.

* This chapter has been inserted by the Probate and Administration Act (XII. of 1913), s. 6

† The words quoted have been substituted for the words "of the province" by the Court-fees (Amendment) Act (X. of 1911)

But, when, by reason of any legal proceeding, the debts due from the deceased have not been ascertained and paid, or his effects have not been recovered and made available, and in consequence thereof the executor or administrator is prevented from claiming the return of such difference within the said term of three years, the said Authority may allow such further time for making the claim as may appear to be reasonable under the circumstances.

COMMENTARY.

Refund of Probate Duty.—See *Collector of Ahmedabad v. Sarchand*, 27 Bom. 140.

19C. Whenever* a grant of probate or letters of administration has been or is made in respect of the whole of the property belonging to an estate, and the full fee chargeable under this Act has been or is paid thereon, no fee shall be chargeable under the same Act when a like grant is made in respect of the whole or any part of the same property belonging to the same estate.

Relief in case of several grants.

Whenever such a grant has been or is made in respect of any property forming part of an estate, the amount of fees then actually paid under this Act shall be deducted when a like grant is made in respect of property belonging to the same estate, identical with or including the property to which the former grant relates.

COMMENTARY.

If a duty has once been paid, no fresh duty is payable if on the expiry of the first grant a double probate is granted in respect of the same property. *Souramangee v. Secretary of State*, 20 C. W. N. 472.

19D. The probate of the will, or the letters of administration of the effects, of any person deceased, heretofore or hereafter granted, shall be deemed valid and available by his executors or administrators for recovering, transferring, or assigning any moveable or immoveable property whereof or whereto the deceased was possessed or entitled, either wholly or partially, as a trustee, notwithstanding the amount or value of such property is not included in the amount or value of the estate in respect of which a court-fee was paid on such probate or letters of administration.

Probates declared valid as to trust-property, though not covered by court-fee

* Here the word "such," repeated by the Repealing and Amending Act (XII of 1931), has been omitted.

COMMENTARY.

No probate duty is payable which the deceased held as a trustee.

19E.* Where any person, on applying for probate or letters of administration, has estimated the estate of the deceased to be of less value than the same has afterwards proved to be, and has in consequence paid too low a court-fee thereon, the Chief Controlling Revenue Authority "for the local area" † in which the probate or letters has or have been granted may, on the value of the estate of the deceased being verified by affidavit or affirmation, cause the probate or letters of administration to be duly stamped on payment of the full court-fee which ought to have been originally paid thereon in respect of such value, and of the further penalty if the probate or letters is or are produced within one year from the date of the grant, of five times, or, if it or they is or are produced after one year from such date, of twenty times, such proper court-fee without any deduction of the court-fee originally paid on such probate or letters :

Provision for case where too low a court-fee has been paid on probates, &c.

ling Revenue Authority "for the local area" † in which the probate or letters has or have been granted may, on the value of the estate of the deceased being verified by affidavit or affirmation, cause the probate or letters of administration to be duly stamped on payment of the full court-fee which ought to have been originally paid thereon in respect of such value, and of the further penalty if the probate or letters is or are produced within one year from the date of the grant, of five times, or, if it or they is or are produced after one year from such date, of twenty times, such proper court-fee without any deduction of the court-fee originally paid on such probate or letters :

Provided that, if the application be made within six months after the ascertainment of the true value of the estate and the discovery that too low a court-fee was at first paid on the probate or letters, and if the said Authority is satisfied that such fee was paid in consequence of a mistake, or of its not being known at the time that some particular part of the estate belonged to the deceased, and without any intention of fraud or to delay the payment of the proper court-fee, the said Authority may remit the said penalty, and cause the probate or letters to be duly stamped on payment only of the sum wanting to make up the fee which should have been at first paid thereon.

19F. In the case of letters of administration on which too low a court-fee has been paid at first, the said Authority shall not cause the same to be duly stamped in manner aforesaid, until the administrator has given such security to the Court by which the letters of administration have been granted as ought by law, to have been given on the granting thereof, in case the full value of the estate of the deceased had been then ascertained.

Administrator to give proper security before letters stamped under section 19F.

* As to power of Chief Controlling Revenue-Authority to remit the whole or part of any penalty or forfeiture payable under s. 19F, see the Probate and Administration Act (VI. of 1889), s. 20 (2).

† The words quoted have been substituted for the words "of the province" by the Court-fees (Amendment) Act (X. of 1901)

19G.* Where too low a court-fee has been paid on any probate or letters of administration in consequence of any mistake, or of its not being known at the time that some particular part of the estate belonged to the deceased, if any executor or administrator acting under such probate or letters does not, within six months . . . † after the discovery of the mistake, or of any effects not known at the time to have belonged to the deceased, apply to the said Authority, and pay what is wanting to make up the court-fee which ought to have been paid at first on such probate or letters, he shall forfeit the sum of one thousand rupees, and also a further sum at the rate of ten rupees per cent. on the amount of the sum wanting to make up the proper court-fee.

Executors, &c., not paying full court-fee on probates, &c., within six months after discovery of under-payment.

COMMENTARY.

Penalty for false valuation of the Estate.—If the estate is fraudulently under-valued the penalty laid down by this section is as follows:—

- (a) If probate or letters are produced within one year from the date of grant the penalty is five times the duty payable.
- (b) If the probate or letters are produced after one year of the grant the penalty is twenty times the duty payable, *Nikunja Rani v. Secretary of State*, 43 Cal. 230.

There is a further penalty imposed on executors or administrators under sec. 19 F. of Rs. 1,000 and a further sum at the rate of 10% on the amount of the under-value if within six months after the discovery of a mistake in value the executor or administrator does not pay the amount wanting to make up the duty. This penalty is personal on the executors or administrators.

19H.‡ (1) Where an application for probate or letters of administration is made to any Court other than a High Court, the Court shall cause notice of the application to be given to the Collector.

Notice of applications for probate or letters of administration to be given to Revenue-authorities, and procedure thereon.

(2) Where such an application as aforesaid is made to a High Court, the High Court shall cause notice of the application to be given to the Chief Controlling Revenue-Authority "for the local area in which the High Court is situated." §

* As to recovery of penalties or forfeitures under s. 19G, see the Probate and Administration Act (VI. of 1889), s. 20 (1).

† Here the words and figures, "after the first day of April 1875, or," repealed by the Repealing and Amending Act (XII. of 1891), have been omitted.

‡ Ss. 19H, 19I, 19J, and 19K have been inserted after 19G by the Court Fees Act Amendment Act (XL. of 1899) s. 2, the original s. 19H having since been repealed by the Guardians and Wards Act (VIII. of 1890) s. 2 and Sch.

§ The words quoted have been substituted for the words "of the province" by the Court-fees (Amendment) Act (X. of 1901).

(3) The Collector, within the local limits of whose revenue jurisdiction the property of the deceased or any part thereof is, may at any time inspect, or cause to be inspected, and take, or cause to be taken, copies of the record of any case in which application for probate or letters of administration has been made; and if, on such inspection or otherwise, he is of opinion that the petitioner has under-estimated the value of the property of the deceased, the Collector may, if he thinks fit, require the attendance of the petitioner (either in person or by agent), and take evidence, and inquire into the matter in such manner as he may think fit, and, if he is still of opinion that the value of the property has been under-estimated, may require the petitioner to amend the valuation.

(4) If the petitioner does not amend the valuation to the satisfaction of the Collector, the Collector may move the Court before which the application for probate or letters of administration was made to hold an inquiry into the true value of the property:

Provided that no such motion shall be made after the expiration of six months from the date of the exhibition of the inventory required by section 277 of the Indian Succession Act, 1865,* or, as the case may be, by section 98 of the Probate and Administration Act, 1881.†

(5) The Court, when so moved as aforesaid, shall hold or cause to be held, an inquiry accordingly, and shall record a finding as to the true value, as near as may be, at which the property of the deceased should have been estimated. The Collector shall be deemed to be a party to the inquiry.

(6) For the purposes of any such inquiry, the Court or person authorized by the Court to hold the inquiry may examine the petitioner for probate or letters of administration on oath (whether in person or by commission), and may take such further evidence as may be produced to prove the true value of the property. The person authorized as aforesaid to hold the inquiry shall return to the Court the evidence taken by him, and report the result of the inquiry, and such report and the evidence so taken shall be evidence in the proceeding, and the Court may record a finding in accordance with the report, unless it is satisfied that it is erroneous.

(7) The finding of the Court recorded under sub-section (5) shall be final, but shall not bar the entertainment and disposal by the Chief Controlling Revenue-Authority of any application under section 19E.

* Act X. of 1865

† Act V. of 1881

(8) The Local Government may make rules for the guidance of Collectors in the exercise of the powers conferred by sub-section (3).

COMMENTARY.

Procedure and inquiry on Valuation.—This section lays down the procedure to be adopted by the Collector if in his opinion any property situate within his province is under-valued. In moving the Court for an inquiry it is not enough for the collector to make an application but he should place before the Court materials showing that an inquiry was needed and he should make out a case for inquiry, *In the goods of James Raley*, 6 C. W. N. 898. In an inquiry under this section the Court has no power to award costs, *Swarnamayee v. Secretary of State*, 43 Cal. 625.

The period of six months provided in clause 4 of the section runs from the filing of an inventory required by sec. 317 of the Succession Act and the inventory must be full and true, *Rajkumari v. Collector of Gaya*, 18 C. W. N. 153 (P. C.); 40 I. A. 236; *Bhubaneswari v. Collector of Gaya*, 41 Cal. 556 (P. C.). In case of dispute as to valuation the Testamentary Registrar must refer the same to the Taxing Master under sec. 5 of the Court Fees Act and if the Taxing Master is doubtful he should issue a certificate and refer the matter to the Chief Justice, *In re Ezekiel*, 21 Bom. 139; *In the goods of Gladstone*, 1 Cal. 168. Under sec. 5 of the Court Fees Act the decision of the Taxing Master is final, *Krishna v. Raghunandan*, 4 Pat. 336 (F. B.); *In re Bhubaneswar*, 29 C. W. N. 879.

19I.* (1) No order entitling the petitioner to the grant of probate or letters of administration shall be made upon an application for such grant until the petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule, and the Court is satisfied that the fee mentioned in No. 11 of the first schedule has been paid on such valuation.

Payment of court-fees in respect of probates and letters of administration.

(2) The grant of probate or letters of administration shall not be delayed by reason of any motion made by the Collector under section 19H, sub-section (4).

19J.* (1) Any excess fee found to be payable on an inquiry held under section 19H, sub-section (6), and any penalty or forfeiture under section 19G, may, on the certificate of the Chief Controlling Revenue-Authority, be recovered from the executor or administrator as if it were an arrear of land-revenue by any Collector in any part of British India.

Recovery of penalties, &c.

(2) The Chief Controlling Revenue-Authority may remit the whole or any part of any such penalty or forfeiture as aforesaid, or any part of any penalty under section 19E, or of any court-fee under section 19E in excess of the full court-fee which ought to have been paid.

Sections 6 and 28
not to apply to probates or letters of administration.

19K.* Nothing in section 6 or section 28 shall apply to probates or letters of administration.

APPENDIX II.

Act No. XV of 1916.

(PASSED BY THE INDIAN LEGISLATIVE COUNCIL).

(RECEIVED THE ASSENT OF THE GOVERNOR GENERAL ON
THE 28TH SEPTEMBER, 1916).*An Act to remove certain existing disabilities in respect of the
power of disposition of property by Hindus for the benefit of
persons not in existence at the date of such disposition.*

WHEREAS it is expedient to remove certain existing disabilities
in respect of the power of disposition of property
by Hindus for the benefit of persons not in existence
at the date of such disposition ; It is hereby enacted as follows :—

1. (1) This Act may be called the Hindu
Disposition of Property Act, 1916.

(2) It extends, in the first instance, to the whole of British
India, except the province of Madras : Provided that the Governor
General in Council may, by notification in the Gazette of India,
extend this Act to the province of Madras.

2. Subject to the limitations and provisions specified in
this Act, no disposition of property by a Hindu,
whether by transfer *inter vivos* or by will, shall be
invalid by reason only that any person for whose
benefit it may have been made was not in existence
at the date of such disposition.

3. The limitations and provisions referred to
in section 2 shall be the following namely :—

(a) in respect of dispositions by transfer *inter vivos*, those
contained in sections 13, 14 and 20 of the Transfer
of Property Act, 1882, and

(b) in respect of dispositions by will, those contained in sections 100 and 101 of the Indian Succession Act, 1865.

4. Where a disposition of property fails by reason of any of the limitations referred to in section 3, any disposition intended to take effect after or upon failure of such prior disposition also fails.

5. Where the Governor General in Council is of opinion that the Khoja community in British India or any part thereof desire that the provisions of this Act should be extended to such community, he may, by notification in the Gazette of India, declare that the provisions of this Act, with the substitution of the word "Khojas" or "Khoja" as the case may be, for the word "Hindus" or "Hindu" wherever those words occur, shall apply to that community in such area as may be specified in the notification, and this Act shall thereupon have effect accordingly.

Madras Act No. 1 of 1914.

(THE HINDU TRANSFERS AND BEQUESTS ACT, 1914)

(14TH FEBRUARY, 1914; 14TH MARCH, 1914).

An Act to declare the rights of Hindus to make transfers and bequests in favour of unborn persons.

WHEREAS it is expedient to declare the rights of persons governed by the Hindu law to make transfers and bequests in favour of unborn persons ; It is hereby enacted as follows —

Short title. 1. This Act may be called "The Hindu Transfers and Bequests Act, 1914."

Application and extent. 2. (1) This Act shall apply to all transfers *inter vivos* and wills made by persons governed by the Hindu law who are domiciled within the limits of the Presidency of Madras.

(2) In the case of transfers *inter vivos* or wills executed before the date of this Act, the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to such date : Provided that nothing contained in this section shall affect *bona fide* transferees for valuable consideration in whom the right to any property has vested prior to the date of the Act.

*Explanation :—*Hindus governed by the Marumakkattayam or the Aliyasantana law shall be deemed to be persons governed by the Hindu law for the purposes of this Act.

Transfers and bequests in favour of unborn persons. 3. A transfer *inter vivos* or disposition by will of any property shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer or the death of the testator, as the case may be.

4. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of the transfer and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the interest created is to belong.

Rule against perpetuity in regard to transfers.

5. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

Rule against perpetuity in regard to bequests.

Act No. VIII of 1921.

(PASSED BY THE INDIAN LEGISLATURE).

(RECEIVED THE ASSENT OF THE GOVERNOR GENERAL ON THE 27TH MARCH, 1921).

An Act to declare the rights of Hindus to make transfers and bequests in favour of unborn persons in the City of Madras.

WHEREAS it is expedient to declare the rights of Hindus to make transfers and bequests in favour of unborn persons in the City of Madras; It is hereby enacted as follows —

Preamble.

Short title

1. This Act may be called the Hindu Transfers and Bequests (City of Madras) Act, 1921.

Application and extent

2. (1) This Act shall apply to all transfers *inter vivos* and wills made by persons governed by the Hindu law who are domiciled within the limits of the Ordinary Original Civil Jurisdiction of the High Court of Madras.

(2) In the case of transfers *inter vivos* or wills executed before the date of this Act, the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to the 14th February, 1914.

Provided that nothing contained in this section shall affect *bona fide* transferees for valuable consideration in whom the right to any property has vested prior to the date of this Act.

Explanation.—Hindus governed by Marumakkattayam or the Aliyasantana law shall be deemed to be persons governed by the Hindu law for the purposes of this Act.

3. A transfer *inter vivos* or disposition by will of any property shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer or the death of the testator, as the case may be.

Transfers and bequests in favour of unborn persons.

4. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of the transfer and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the interest created is to belong.

Rule against perpetuity in regard to transfers

5. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

Rule against perpetuity in regard to bequests

APPENDIX III.

Act No. XII of 1855.

RECEIVED THE ASSENT OF THE GOVERNOR GENERAL ON
THE 27TH MARCH 1855.

*An Act to enable Executors, Administrators, or Representatives
to sue and be sued for certain wrongs.*

WHEREAS it is expedient to enable Executors, Administrators,
Preamble. or Representatives in certain cases to sue and be
sued in respect of certain wrongs which, according
to the present law, do not survive to or against such Executors,
Administrators, or Representatives. It is enacted as follows :—

1. An action may be maintained by the executors, adminis-
trators, or representatives of any person deceased
for any wrong committed in the lifetime of such
person, which has occasioned pecuniary loss to his
estate, for which wrong an action might have been
maintained by such person so as such wrong shall
have been committed within one year before his death, [*and pro-
vided such action shall be brought within one year after the death of
such person*]* and the damages, when recovered, shall be part of the
personal estate of such person; and further, an action may be main-
tained against the executors or administrators or heirs or represen-
tatives of any person deceased for any wrong committed by him in
his lifetime for which he would have been subject to an action, so as
such wrong shall have been committed within one year before such
persons' death, [*and so as such action shall be commenced within
two years after the committing of the wrong*]* and the damages to
be recovered in such action shall, if recovered against an executor or
administrator bound to administer according to the English law, be
payable in like order of administration as the simple contract debts
of such person.

2. No action commenced under the provisions of this Act
shall abate by reason of the death of either party,
but the same may be continued by or against the
executors, administrators, or representatives of the

Death of either party
not to abate suit

* Repealed by Act 9, of 1871

party deceased : Provided that in any case in which any such action shall be continued against the executors, administrators or representatives of the deceased party, such executors, administrators or representatives may set up a want of assets as a defence to the action, either wholly or in part, in the same manner as if the action had been originally commenced against them.

Proviso.

Act No. XIII of 1855.

RECEIVED THE ASSENT OF THE GOVERNOR GENERAL ON
THE 27TH MARCH 1855.

An Act to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong.

WHEREAS no action or suit is now maintainable in any Court against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him : It is enacted as follows :—

Preamble.

1. WHENEVER the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action or suit for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime. And it is enacted further that every such action or suit shall be for the benefit of the wife, husband, parent, and child if any, of the person whose death shall have been so caused, and shall be brought by, and in the name of the executor, administrator, or representatives of the person deceased; and in every such action the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively for whom, and for whose benefit, such action shall be brought, and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the beforementioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct.

Action for compensation to the family of a person for loss occasioned to it by his death by actionable wrong

2. Provided always that not more than one action or suit shall be brought for, and in respect of, the same subject matter of complaint ; [*and that every such action shall be brought within twelve calendar months after the death of such deceased person ;*]*
- Not more than one action to be brought. To be commenced within 12 months.
- Provided that in any such action or suit the executor, administrator or representative of the deceased may insert a claim for, and recover any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect, or default, which sum, when recovered, shall be deemed part of the assets of the estate of the deceased.
- Claim for loss to the estate may be added.

3. The plaintiff in any such action or suit shall give a full particular of the person or persons for whom, or on whose behalf, such action or suit shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.
- Plaintiff shall deliver particulars &c.

4. The following words and expressions are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject matter ; that is to say, words denoting the singular number are to be understood to apply also to a plurality of persons or things, and words denoting the masculine gender are to be understood to apply also to the persons of feminine gender ; and the word " person " shall apply to bodies politic and corporate ; and the word " parent " shall include father and mother, and grandfather and grandmother ; and the word " child " shall include son and daughter, and grandson and granddaughter and stepson and stepdaughter.
- Construction of Act.

APPENDIX IV.

MARRIED WOMEN'S PROPERTY ACT.

Act III of 1874.

RECEIVED THE G. G.'S ASSENT ON THE 24TH FEBRUARY 1874.

*An Act to explain and amend the law relating to certain
Married Woman and for other purposes.*

WHEREAS it is expedient to make such provision as hereinafter
Preamble appears for the enjoyment of wages and earnings
by women married before the first day of January
1866, and for insurances on lives by persons married before or after
that day :

And whereas by the Indian Succession Act, 1865, section 4, it
is enacted that no person shall by marriage acquire any interest in
that property of the 'person whom he or she marries nor become
incapable of doing any act in respect of his or her own property
which he or she could have done if unmarried ;

And whereas by force of the said Act all women to whose
marriage it applies are absolute owners of all property vested in or
acquired by them, and their husbands do not by their marriage
acquire any interest in such property, but the said Act does not
protect such husbands from liabilities on account of the debts of
their wives contracted before marriage, and does not expressly pro-
vide for the enforcement of claims by or against such wives :

It is hereby enacted as follows :—

I.—Preliminary.

Short title.

1. This Act may be called "The Married
Women's Property Act, 1874."

Extent and applica-
tion.

2. It extends to the whole of British India,
and, so far as regards subjects of her Majesty, to
the dominions of Princes and States in India in
alliance with Her Majesty.

But nothing herein contained applies to any married woman, who, at the time of her marriage, professed the Hindu, Muhamadan, Buddhist, Sikh or Jaina religion, or whose husband, at the time of such marriage, professed any of those religions.

And the Local Government may from time to time, by order, either retrospectively from the passing of this Act, or prospectively, exempt from the operation of all or any of the provisions of this Act members of any race, sect, or tribe, or part of a race, sect or tribe, to whom he may consider it impossible or inexpedient to apply such provision.

The Local Government may also revoke any such order, but not so that the revocation shall have any retrospective effect.

All orders and revocations under this section shall be published in the local official Gazette.

... ..*

3. (*Repealed by Act XII of 1876*)

II.—*Married Women's Wages and Earnings.*

Married women's earnings to be their separate property. 4. The wages and earnings of any married woman acquired or gained by her after the passing of this Act, in any employment, occupation, or trade, carried on by her, and not by her husband,

and also any money or other property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all savings from, and investments of such wages, earnings, and property,

shall be deemed to be her separate property, and their receipts alone shall be good discharges for such wages, earnings, and property.

III.—*Insurances by Wives and Husbands.*

Married woman may effect policy of insurance 5. Any married woman may effect a policy of insurance on her own behalf and independently of her husband; and the same and all benefit thereof, if expressed on the face of it to be so effected shall enure as her separate property, and the contract evidenced by such policy shall be as valid as if made with an unmarried woman.

* The para repealed by the Succession Act XXXIX of 1925.

6. (1) A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interests so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate.

When the sum secured by the policy becomes payable, it shall, unless special trustees are duly appointed to receive and hold the same, be paid to the Official Trustee of the Presidency in which the office at which the insurance was effected is situate, and shall be received and held by him upon the trusts expressed in the policy or such of them as are then existing.

And in reference to such sum he shall stand in the same position in all respects as if he had been duly appointed trustee thereof by a High Court under Act No. XVII. of 1864 (*to constitute an office of Official Trustee*), section 10.

Nothing herein contained shall operate to destroy or impede the right of any creditor to be paid out of the proceeds of any policy of assurance which may have been effected with intent to defraud creditors.

(2) *Notwithstanding anything contained in section 2, the provisions of sub-section (1) shall apply in the case of any policy of insurance such as is referred to therein which is effected by any Hindu, Muhammadan, Sikh or Jain in Madras after the 31st day of December, 1913, or in any other part of British India after the first day of April 1923 ;

Provided that nothing herein contained shall affect any right or liability which has accrued or been incurred under any decree of a competent Court passed before the first day of April 1923.

IV.—Legal Proceedings by and against Married Women.

7. A married woman may maintain a suit in her own name for the recovery of property of any description which, by force of the said Indian Succession Act, 1865, or of this Act, is her separate property ; and she shall have, in her own name, the same remedies, both civil and

* See Act No. XIII of 1923.

criminal, against all persons, for the protection and security of such property, as if she were unmarried, and she shall be liable to such suits, processes, and orders in respect of such property as she would be liable to if she were unmarried.

8. If a married woman (whether married before or after the first day of January 1866) possesses separate property, and if any person enters into a contract with her with reference to such property, or on the faith that her obligation arising out of such contract will be satisfied out of her separate property, such person shall be entitled to sue her, and, to the extent of her separate property, to recover against her whatever he might have recovered in such suit had she been unmarried at the date of the contract, and continued unmarried at the execution of the decree.

Wife's liability for post-nuptial debts.

Provided that nothing herein contained shall affect the liability of a husband for debts contracted by his wife's agency, express or implied.

17.—Husband's Liability for Wife's Debt.

9. A husband married after the thirty-first day of December 1865 shall not, by reason only of such marriage, be liable to the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and shall, to the extent of her separate property, be liable to satisfy such debts as if she had continued unmarried.

Husband not liable for wife's ante-nuptial debts

Provided that nothing contained in this section shall invalidate any contract into which a husband may, before the passing of this Act, have entered in consideration of his wife's ante-nuptial debts.

Provided

APPENDIX V.

ADMINISTRATION OF ESTATES REGULATION, 1827.

(BOMBAY REGULATION VIII OF 1827).

Passed on the 1st January, 1827.

A Regulation to provide for the formal recognition of heirs, executors and administrators, and for the appointment of administrators and managers of property by the Courts.

WHEREAS at the same time that it is in general desirable that the heirs, executors or legal administrators of persons deceased should, unless their right is disputed, be allowed to assume the management or sue for the recovery of property belonging to the estate, without the interference of Courts of Justice, it is yet in some cases necessary or convenient that such heirs, executors or administrators, in order to give confidence to persons in possession of, or indebted to, the estate to acknowledge and deal with them, should obtain a certificate of heirship, executorship or administratorship, from the Zila Court;

Preamble

And whereas, whenever there is no person on the spot entitled or willing to take charge of the property of a person deceased, or when the right of succession is disputed between two or more claimants, none of whom has taken possession, or where the heirs are incompetent to the management of their affairs and have no near relations entitled and willing to take charge on their behalf, or where a person possessed of property dies intestate and without known heirs, it is essential that the Zila Court should appoint an administrator for the management of the estate;

the following rules are therefore enacted * * * *(a).

CHAPTER I.

RULES FOR THE RECOGNITION OF HEIRS, EXECUTORS AND ADMINISTRATORS WHEN THERE IS A COMPETENT CLAIMANT.

1. WHENEVER a person dies leaving property, whether moveable or immoveable, the heir, or executor or legal administrator, may assume the management or sue for the recovery, of the property, in conformity with the law or usage applicable to the disposal of the said property, without making any previous application to the Court to be formally recognised.

Legal heir, etc., of person deceased competent to represent him, without recognition from Court.

2. First.—But if an heir, executor or administrator is desirous of having his right formally recognised by the Court for the purpose of rendering it more safe for persons in possession of, or indebted to, the estate to acknowledge and deal with him, the judge, on application, shall issue a proclamation, in the form contained in Appendix A, inviting all persons who dispute the right of the applicant to appear in the Court within one month from the date of the proclamation and enter their objections and declaring that, if no sufficient objection is offered, the Judge will proceed to receive proof of the right of the applicant, and, if satisfied, grant him a certificate of heirship, executorship or administratorship.

But if such recognition is requested, proclamation will be issued.

Second.—[*Publication of Proclamation*] *Repealed by Act XII of 1873.*

3. If, at the expiration of the time mentioned in the proclamation, no sufficient objection has been made, the Court shall forthwith receive such proof as may be offered of the right of the person making the claim, and if satisfied, shall grant a certificate in the form contained in Appendix B, declaring him the recognized heir, executor or administrator of the deceased.

If no objection appears, recognition to be granted.

4. First.—If before the expiration of the time, any objection is made to the right of the person claiming as heir, executor or administrator, the Judge, on a day to be fixed (of which at least eight days' previous notice shall be given to the parties) shall summarily investigate the grounds of the objections on the one hand, and of the right claimed on the other, examining such witnesses or other evidence as may be adduced by the parties, and either grant or refuse a certificate, as the circumstances of the case may require.

Objection appearing, to be examined, and recognition given or refused accordingly

Second.—But, if from the evidence adduced, it appears that the question at issue between the parties is of a complicated or difficult nature, the Judge may suspend proceedings in the application for a certificate until the question has been tried by a regular suit instituted by one of the parties.

If question is complicated or difficult, matter to be left for adjudication

5. Whenever an executor is formally recognised, under the rule contained in section 4, the authenticity of the will, if any, by which he is appointed, shall be proved, and the certificate of executorship shall be endorsed thereon.

Authenticity of wills and recognition to be certified

6. [*Wills and Recognitions to be registered.*] *Repealed by Act XII of 1873.*

7. First.—An heir, executor or administrator, holding the proper certificate, may do all acts and grant all deeds competent to a legal heir, executor or administrator, and may sue and obtain judgment in any Court in that capacity.

Recognised heir, etc., competent to manage property.

Second.—But as the certificate confers no right to the property, but only indicates the person who for the time being, is in the legal management thereof, the granting of such certificate shall not finally determine nor injure the rights of any person : and the certificate shall be annulled by the Zila Court, upon proof that another person has a preferable right.

But recognition gives no title to property.

Third.—An heir, executor or administrator holding a certificate, shall be accountable for his acts done in that capacity to all persons having an interest in the property, in the same manner as if no certificate had been granted.

Nor relief from responsibility to claimants.

8. The refusal of a certificate by the Judge shall not finally determine the rights of the person whose application is refused, but it shall still be competent to him to institute a suit for the purpose of establishing his claim.

Refusal of recognition no judgment against claim of applicant.

CHAPTER II.

OF THE APPOINTMENT OF AN ADMINISTRATOR BY THE ZILA COURT,
WHEN THERE IS NO HEIR OR EXECUTOR COMPETENT AND
WILLING TO BE PLACED IN POSSESSION.

9. Whenever there is no person on the spot entitled and willing to take charge of the property of a person deceased, where the right of succession is disputed between two or more claimants, none of whom has taken possession, or where the heirs are incompetent to the management of their affairs from infancy, insanity or other disqualification, and have no near relations entitled and willing to take charge on their behalf, the judge, within whose jurisdiction such property is, may appoint an administrator for the management thereof, until the lawful heir, executor or administrator appears, or the right of

When heir, etc., is present but undetermined, or incompetent

Judge may appoint administrator, to be duly accountable when emergency at end.

succession is determined, or the disqualification of the heir is removed, as the case may be, when the judge, on being satisfied of the facts, shall direct the administrator in charge to deliver over the property to such person, with a full account of all receipts and disbursements during the period of his administration.

10. First.—Whenever any person dies intestate, and without known heirs, leaving property, the judge, within whose jurisdiction the property is, shall appoint an administrator for the management thereof, and shall issue a proclamation in the form contained in Appendix C, calling upon the heir of the deceased or any person entitled to receive charge of the property, to attend and prefer his claim.

If heir, etc., unknown, administrator to be appointed, and proclamation to be issued

Second.—The proclamation shall be published, and if the deceased was a native of any district or country without the limits on the Court's jurisdiction, and the property is of the value of Rupees one thousand or upwards, the proclamation shall also be published in the Government newspaper.

and published.

Third.—If any person appears and satisfies the judge of his right to the possession of the property or any part of it as heir, executor or administrator or otherwise, it shall be delivered up to him, after deducting the necessary expenses of management.

Heir, etc., appearing to be put in possession.

Fourth.—But, if no person appears and establishes his right, the Judge on the 31st December next after the completion of twelve months from the appointment of the administrator, shall make a report of the circumstances of the case to the Sadr Diwani Adalat, accompanied by an inventory and valuation of the property; and it shall be lawful for the Sadr Diwani Adalat either to direct the property to continue for a further period under the management of the administrator, or to be sold by him under the authority of the Court, and the proceeds to be deposited in the public treasury for the eventual benefit of all concerned.

and if no heir appears, reference to Sadr Diwani Adalat

who will grant time or order sale and proceeds to be deposited

11. Whenever an administrator is appointed by the Judge under sections 9 and 10 of this Regulation, he shall, previously to his entering upon the execution of office, give security in a sum to be fixed by the

Administrator appointed by Court to give security

Judge for the faithful discharge of his trust, and he shall be entitled to such remuneration as the Judge may fix for his trouble, but subject to modification by the Sadr Diwani Adalat, on the complaint of any person interested.

and to be remunerated at discretion of Judge.

APPENDIX A.

FORM OF PROCLAMATION TO BE ISSUED WHEN A PERSON APPLIES TO BE RECOGNISED AS HEIR, EXECUTOR OR ADMINISTRATOR OF ONE DECEASED.

Proclamation.

In the Court of the Zila of

Whereas A. B., inhabitant of _____, died at _____ on or about the _____ day of _____, and whereas C. D., inhabitant of _____ has presented an application to the Judge of the said Zila for the purpose of being formally recognised as heir (executor or administrator, as the case may be) of the said A. B., this is to give notice to all persons who may dispute the right of the said C. D., as heir (executor or administrator, as the case may be) of the said A. B., to appear in the Court of the said Zila within one month of the date of this proclamation, there to enter their objections; and it is hereby declared that if no sufficient objection is offered before the expiration of the said period, the said Judge will forthwith proceed to receive proof of the said C. D.'s right, and to grant him, provided he shall appear to be entitled thereto, a certificate of heirship (executorship or administratorship, as the case may be) of the said A. B., deceased.

Dated at

this
(Signed)

day of
By the Judge,
Senior Assistant Judge,
or
Junior Assistant Judge.

APPENDIX B.

FORM OF CERTIFICATE TO BE GRANTED TO THE RECOGNISED HEIR, EXECUTOR OR ADMINISTRATOR OF ONE DECEASED.

Certificate.

In the Court of the Zila of

Whereas A. B., inhabitant of _____, died at _____ on or about the _____ day of _____, and application was made by C. D., inhabitant of _____, to the Judge of the said Court, to be formally recognised as heir (executor or administrator, as the case may be) of the said A. B., and, whereas the usual proclamation having been issued, no sufficient objection was offered to the right of the said C. D., and whereas the said C. D.

thereupon gave proof to the satisfaction of the Court of his right to be recognised as heir (executor or administrator, as the case may be) of the said A. B.

This, therefore, is to certify that the said C. D., is the recognised heir (executor or administrator) of the said A. B., deceased.

Dated at this day of
 (Signed) *By the Judge.*
 Senior Assistant Judge,
 or
 Junior Assistant Judge.

APPENDIX C.

FORM OF PROCLAMATION TO BE ISSUED WHEN A PERSON DIES INTESTATE, AND WITHOUT KNOWN HEIRS, LEAVING PROPERTY.

Proclamation

In the Court of the Zila of

Whereas A. B., the inhabitant of _____, died at _____ on or about the _____ day of _____, leaving the following property at _____, within the said Zila, namely, (*here specify the property*); and whereas no will of the said A. B. has been found, nor is it known if he has any heirs. This is to give notice to all persons claiming to be heirs, or to be entitled to receive charge of the said property, to attend and prefer their claim in the said Court, in order that, on such claim being proved, the said property may be delivered up to them.

Dated at this day of
 (Signed) *By the Judge,*
 Senior Assistant Judge,
 or
 Junior Assistant Judge.

INDEX.

A	PAGE.	Administration—	PAGE.
Abatement—	PAGE.	GRANT OF GENERAL LETTERS.	
of annuities ...	210, 342	in what cases essential with will annexed ...	234
of demonstrative legacies ...	341	under Probate and Administration Act when essential ...	235
of general legacies ...	339, 340	under Hindu Wills Act ...	234
of legacy for life ...	340	in what cases of intestacy essential...	235
—given in satisfaction of debt ...	340	to whom general administration is to be granted under Succession Act...	242
—given to wife or child ...	340	order in which grant to be made ...	243
of specific legacies ...	341	when refused in case of Hindus and Mahomedans ...	312
Absolute Interest—		—may not be granted ...	266
what words will give ...	101, 105, 106	when widow not entitled to ...	243
cutting down of gift of ...	181	rights of next-of-kin to ...	244
in case of Hindu Wills ...	102	several next-of-kin in equal degrees...	244
examples of qualified and ...	182	when creditor entitled to...	244
Accounts—		of the estate of a foreigner ...	245
to be filed by executor or administrator ...	333, 334	—of a bastard ...	244
Action—		under Probate and Administration Act ...	241
survival of right of ...	319	effect of grant by Native States .	245
in contract ...	320	<i>Of the mode of granting—</i>	
in tort ...	320	petition for letters of . .	301
Accumulation—		contents of the petition ...	302
when allowed ...	143	time of granting ...	304
during minority ...	145	who can grant ...	291, 292
difference between English and Indian law as to ...	144	when District Judge may grant ...	295
according to Hindu law ...	145	when District Delegate may grant ...	296
Acknowledgment—		to have effect throughout the whole of British India ...	296, 297
what is sufficient, by testator of his signature ...	53	<i>Grounds for revocation of—(see Revocation)</i>	
before Registrar ...	54	WITH THE WILL ANNEXED—	
after attestation not sufficient ...	54	when necessary ...	263, 266
of debt by one of several executors or administrators ...	331	to whom to be granted ...	264
Ademption ...	195-203	LIMITED ADMINISTRATION...	267-281
meaning of ...	195, 196	<i>Durante Absentia—</i>	
of specific bequest of debt ...	197	to the attorney of an absent executor	269
—goods ...	201	consequence of the return or death of executor...	270
—stock ...	199	power of such administrator ...	270
does not arise if conversion is without authority ...	202	to the attorney of absent residuary legatee ...	270, 271
—article pledged ...	203	—of-kin ...	271
destruction of thing specifically bequeathed effects ...	196	— ...	271

Administrator-General—	PAGE	Amendment—	PAGE
grant of letters of administration to	244, 265	in grants when made	282
transfer of assets to, by executor or administrator	255	procedure	283
petition by, not required to be verified	303		
Adoption—		Animus Revocandi—	
bequest to son whose adoption is invalid	79	essential in destroying will	65
Advancement—		Animus Testandi—	
doctrine of, not recognised under Succession Act... ..	32, 33	will must be made with	52
Age—		Annuity—	
how far old age affects capacity to make will	43	definition of	208
gift on attaining twenty-one and beyond—(see <i>period of distribution</i>)	125	bequest of, whether for life or perpetual	209
—on eldest son attaining eighteen	125	abatement of	209, 210
—on youngest son attaining majority	126	considered general legacy for purpose of abatement	210
—at eighteen	155	bequest of, to be satisfied before residue	210
—at twenty-five with a gift over ...	166	as specific gift of interest in real estate	210
		valuation of	210
Allen—		bequest of, to two persons ...	210
may make a will	40, 55	payment of	346, 347
may be appointed executor	248	purchase of	348
administration to the estate of	245, 360	interest when payable on anticipation, restraint on	355
distribution of the estate of	338		18
Alienation—		Appeal—	
condition in restraint of	169	to High Court from order of District Judge	313
by executor or administrator when set aside	325	from order of grant of Succession Certificate	376, 377
Allowance—		Appointment—	
to executor	328	of executor may be express or implied	246, 249
Alterations—		power of—(see <i>Power of Appointment</i>)	25
in a will, effect of	50	Apportionment—	
—how to be attested... ..	68	of rents, taxes, and other periodical payments	205
—made by pencil, effect of	8		
—court cannot make, in will	279	"Approbation"—	
in grants	282	meaning of	275
Alternative Bequest—		Arbitration—	
construction of	103	personal liability of executor or administrator on submission to	251
Ambassador—		Armenians—	
domicile of	12	Succession Act applies to	212
Ambiguity—		Assault—	
admission of extrinsic evidence in case of latent	83	actions for, <i>de tort</i> & <i>de curia</i>	372
exclusion of extrinsic evidence in case of patent	84		
upon the factum, of the will ...	80		

Assent—	PAGE
to legacy necessary to complete legatee's title ...	342
—given in satisfaction of debt ...	344 (ex. 1)
—may be given before probate ...	256
—by whom given ...	345
—by executor to his own legacy necessary ...	344
nature of ...	343
may be conditional ...	343
how to be given ...	343
effect of ...	343, 344
when retracted ...	344

Assets—	
meaning of ...	334
what are, in the hands of executors or administrators ...	334, 336, 361
distribution of... ..	337, 357
—of the estate of foreigner ...	360

Attestation—	
of wills ...	51
by two or more witnesses ...	52
form of, no form necessary ...	53
by witnesses before testator signs, not valid ...	53

Attesting Witnesses—	
who are capable of being not competent to sign will on testator's behalf ...	61
cannot acknowledge signature ...	52
must sign in the presence of testator ...	52
mark of, not sufficient ...	52
buquest to ...	61
—husband or wife of... ..	61
—in case of wills of Hindus ...	61
marriage of, to a legatee under will ...	61 (ex. 8)
solicitor loses professional charges by attesting will ...	61 (ex. 10)
examples on ...	61

"Aulad"—	
meaning of ...	110

B

Banker—	
liability of executor or administrator on failure of ...	364, 365 (ex. 10, 11, 12)
Bankrupt—	
may be appointed executor ...	210
Bankruptcy—	
condition determining interest on ...	170

"Bapika Vausmanthi"—	PAGE.
meaning of ...	74
Bastards—	
letters of administration to estate of... ..	214
Bequest—	
to an adopted son ...	79
to an attesting witness ...	60, 61
to a class, (see <i>class</i>) ...	
to children, construction... ..	78 (ill. 4)
to children of A and B, meaning of... ..	109
to legitimate or illegitimate children ...	78 (ex. 5), 75 (ex. 3), 112
to charitable uses (see <i>Charitable Bequests</i>) ...	
to creditors and portioners (see <i>Creditor and portioner</i>) ...	211
to descendants ...	110
to executor or administrator ...	100
to an executor... ..	100, 186
to family ...	98, 100
to a joint family ...	103
to joint tenants ...	121
to heirs ...	98, 99
to husband and wife, creates joint tenancy ...	99, 121
to an idol ...	148, 265
to issue and descendants... ..	110
to nephews and nieces ...	75 (ex. 1), 85 (ill d), 110
to next of kin ...	100
to offspring ...	111
to <i>persona designata</i> ...	77
to relations, nearest, most necessitous or poorest ...	98
to representatives ...	100
to a residuary legatee (see <i>residuary legatee</i>) ...	
to servant ...	78
to a son ...	79, 91
—when void for uncertainty ...	91
to wife of testator ...	91
—of third person ...	91
to A and his children, etc., meaning of ...	103
to A and his brothers ...	105
to A and his issue ...	106
to A or to B ...	104
to A or his heirs or next-of-kin ...	104
to A and in case of his dying under age to B ...	120
to A and B or to the survivor of them ...	106
of annuity, (see <i>Annuities</i>) ...	208
conditional, (see <i>Conditional Bequests</i>) ...	168
contingent, (see <i>Contingent Bequests</i>) ...	163

[illegible]

Debts—	PAGE	Delusions—	PAGE.
construction of the term ...	88	effect of, upon capacity to make a will ...	42
of deceased, order of payment of ...	336, 337, 339	Demonstrative Legacy—	194-195
executor has authority to compound ...	363	definition of ...	189, 194
barred by limitation, executor may pay ...	337	distinction between specific general and ...	189
executor's assent to forgiveness of ...	344 (ex. 1)	when abate ...	341
legacy of, whether specific general ...	188	interest on ...	353
" " when lapses ...	119	order of payment of ...	340
suit for "debt" what is, ...	238, 239	abatement of ...	341
part of debt when certificate granted. ...	239	assent to ...	341
De Bonis Non—		Dependent Relative Revocation—	
grants of administration ...	254, 281	of wills, doctrine of ...	67
to whom made ...	281	of obliterations and interlineations ...	68
powers of administrator ...	281	Descendants—	
Deception—		lineal ...	28
will made under an impulse of ...	78 (exs 6, 7)	meaning of ...	110
Declaration— (see <i>Evidence</i>).		Description—	
Deed Poll—		of property in will to refer to death of testator ...	93
not a testamentary instrument ...	57 (ex. 4)	of legacies, (see <i>bequests</i>)	
Defamation—		of legatees, (see <i>Legatees</i>)	
actions for, do not survive ...	319	Destruction—	
Definitions—		revocation of will by ...	65
administrator ...	5	Devastavit—	
annuity ...	208	meaning of ...	361
class ...	107	liability of executor and administrator for ...	362
codicil ...	5	by co-executors or co-administrators. ...	363
consanguinity lineal, collateral ...	20	Dharam—	
demonstrative legacy ...	189	bequest to, void for uncertainty ...	92
domicile ...	14	Directions—	
<i>donatio mortis causa</i> ...	219	to executors or administrators ...	315
executor ...	5	Discharge—	
executor <i>de son tort</i> ...	315, 316	of executors and administrators ...	314
general legacy ...	189	Discretion—	
nuncupative will ...	8	of executor as to conversion and investment ...	351
portion ...	211	Distribution—	
privileged will ...	8	of property of deceased (see <i>Assets and Administration</i>).	
probate ...	5	period of ...	125
residue ...	116	District Delegate—	
specific legacy ...	189	appointment of ...	292
unprivileged will ...	8	powers of ...	306
will ...	5	grant of probate and letters of administration by ...	296
Degrees—		disability of ...	306
mode of calculating ...	22		
Delegates— (see <i>District Delegates</i>).			
Dellrium—			
and insanity ...	42		

District Judge—	PAGE.	Drunkenness—	PAGE.
jurisdiction of... ..	291	how far affects capacity to make a	
powers of	292, 293, 294, 303	will	45
grant of probate and letters of admin-		Dumb Persons—	
istration by, when	295, 296	may make wills	47
proceedings to be regulated by Civil		Duplicate Wills—	
Procedure	293	what are	53
Divorce—		Durante Minore <i>Ætate</i> —(see <i>Æd-</i>	
actions for, do not survive	319	ministration).	
domicile of married woman who has		Dower	
obtained decree for	15	whether it is debt within the Success-	
Domestic Servant—		sion Certificate Act	22
bequest to	78		
Domicile	10-16	E	
definition of	14	East Indians—	
by birth	14	Succession Act applies to	22
by choice	14	Eccentricity	22
by operation of law	15	Effects—	
of origin	12	what passes by a bequest of	4
of lunatic	16	Eldest Son—	
of minor	15	bequest to, how construed	
of married woman	15	Election	
—after husband's death	15	circumstances under which it takes	
of ambassador, consul, etc.,	12, 15	place	
a person can have only one	14	principle of the doctrine of	
no person can be without a	14	foundation and characteristic of	
succession to moveable property gov-		doctrine of	
erned by law of	10, 13	requisites of	
acquisition of new special mode of		by conduct	
acquiring	12, 15	waiver of	
change of	16	effect of enjoyment for two years	
grant of probate establishes	258	when parties cannot be seen	
Donatio Mortis Causa	219-222	<i>status quo</i>	
requisites of	220	time of making	
may be made orally or in writing	220	difference between English	
subject matter of	220	law as to	
effect of recovery of donor from ill-		under Hindu law	
ness	221	En Ventre Sa Mere—	
how it differs from a legacy	221	a child to be considered	
—from a gift <i>inter vivos</i>	221	at father's death	
according to Mahomedan law	221	words expressive of	
—Hindu law	222	ply to a child	
examples of	222	Equivocation—	
Double Possibility—		in description	
rule as to	134	Error—(see <i>Mistake</i>)	
origin of the rule of	134	Estate—(see <i>Exer</i>)	
distinguished from perpetuity	135	Estate and Effects—	
Double Probate—		what passes	
what it is	253		
Draft—			
probate of draft of a will	267		

"Et Cetera"—	PAGE
what the word will pass in a will ...	116
Eurasians—	
Succession Act applies to ...	3
Europeans—	
law governing... ..	2, 3
Evidence—	
to prove will	43
of due execution of will	54
of intention of testator	75
of mistake in name or description ...	77
admissibility of parol, to identify documents to be incorporated ...	56
admissibility of parol, for construction of cumulative bequests ...	115
——in case of secret trust	186
——in case of ambiguity on the factum of instrument	80
——in case of latent ambiguity ...	83
——declarations in case of ambiguity	84
——in case of cumulative bequests ...	115
——to prove lost will	208
Execution of Wills—	
of unprivileged	51
of privileged	58
Executor—	
definition of	5
bequest to	100, 186, 187
appointment of, express or implied	246, 249
appointment of joint	247
appointment by some one on behalf of testator	249
——absolute or qualified	251
who may be appointed	248
according to tenor	249
instituted and substituted	250
co-adjutors or overseers	251
property vests in, from date of testator's death	231
interest of, in the property of deceased ...	231
representative title of	230
unfitness of, no ground for refusing probate	247
character and property of	231
——of the will of Hindus	232, 326
——of the will of Mahomedans	232
grant of probate to	234
when probate cannot be granted to... ..	235
what may be done by, before probate	237, 255, 256

Executor—contd.	PAGE.
difference between authority of administrator and	230
transmissibility of the office of executor of executor not a derivative executor	254
cannot assign executorship	254
acceptance and renunciation by who has once accepted cannot renounce	260
retainer by	338
lunacy of, subsequent to grant of probate	273
POWERS OF	319
to file suits	237
to sell, mortgage under Succession Act	323
to lease	323, 327
to pledge	323
to manage	327, 328
to sell or mortgage under Hindu Wills Act	325
to sell or mortgage under the Probate and Administration Act	326
cannot set up an adverse title assent to legacies (see Assent).	330
DUTIES OF	332
when residuary legatee entitled to call upon executor to sell	359
owes no duty to legatee to give notice of terms of legacy	180
conversion of residus by (see Conversion)	
BEQUEST TO—	
cannot take unless he proves will as a mark of personal regard ...	186
what is sufficient assumption to satisfy condition	187
LIABILITY OF—	
for devastavit... ..	362
——of co executor	363
in signing receipts	363
cannot lend money to co-executor on personal security	363
for carrying on the business of the deceased	365
when charged with interest	363
DISABILITIES OF	329
ALLOWANCE TO	328
DISCHARGE OF	255, 314
DEATH OF ONE OF SEVERAL	332
DIRECTIONS TO	315
RENUNCIATION BY	260
Executor De Son Tort	315-319
definition of	316

EXECUTOR DE SON TORT— <i>contd.</i>		PAGE	Funeral Expenses—		PAGE.
what acts constitute ...	...	316	what allowed ...	...	333, 336
——to not constitute ...	...	317	order of payment ...	...	337
liability of ...	...	317	Furniture—		
sale by ...	...	317	what passes by a bequest of ...	...	88
disability of ...	...	318	G		
according to Hindu and Mahomedan law ...	...	318	General Legacy—		
"Executorship Expenses"—			definition of ...	...	189
what they mean ...	...	336, 337	how it differs from specific and demonstrative ...	...	189
"Executor's Year" ...		345, 346	abatement of ...	...	340
Executory devise ...		134	executor's assent to ...	...	342
Exemplification—			order of payment of ...	...	337, 340
what is, ...	...	259	interest on ...	...	354
"Exempted Person" ...		10	"Generation to Generation"—		
F			construction ...	106, 139 (ex. 10), 185 (ex. 5)	
Fac-Simile Probate ...		289	Gift Over ...		
Family—			legacy to A and in case of his dying under age to B ...	...	159, 165
inquiry as to family of deceased when made in construing wills ...	...	74	legacy to A, B, C and if they all die under age to D ...	...	120
who is entitled under bequest to ...	98, 100		gift at marriage or 18 with a ...	...	159
bequest to members of a joint ...	...	109	Goods—		
house bequest of, for residence ...	...	131	household, what passes under the term. 88 and chattels, meaning of expression ...	...	88
Felo De Se—			Good will—		
may make a will ...	...	40	what passes under the term ...	...	89
Felon—			Grand Children—		
may make a will ...	...	40	meaning of ...	...	110
Final Division—			Grant—(see Probate, Administration).		
meaning of ...	...	158 (ex b)	Guardian—		
Foreigner—			appointment of testamentary ...	...	39, 41
may make a will ...	...	55	——by Hindus ...	...	41
may be executor ...	...	248	instrument appointing testamentary, not entitled to probate... ..	...	247
probate of will of ...	...	258	grant of administration to ...	...	271
administration of the estate of ...	...	245, 338, 360	H		
Forged Will—			Half Blood—		
payment to executor under ...	...	312	equally entitled to succeed with whole blood ...	...	32 (note)
Form—			"Heir"—		
of will ...	...	7, 72	bequest to ...	...	98
of attestation ...	...	53	male heir ...	...	107
Fraud—			suit against ...	...	237
In the making of will ...	...	84	High Court ...		
will void if obtained by ...	...	46, 47	powers of ...	...	9
words inserted in will by... ..	...	80	concurrent jurisdiction of ...	...	295
probate obtained by ...	...	284			
Funeral—					
duty of executor as to ...	...	332			

Liability—	PAGE.		PAGE.
of executor or administrator for de-		Locke King's Act ...	201
vastavit	362	Lost Will—	
—of co-executor or co-adminis-		presumption as to revocation ...	66
trator	363	probate of	267
—joining in giving receipt ...	363	Lucid Interval—	
—on failure of banker ...	364	will made during	44
(exs. 10, 11, 12)		Lunatic—	
—for carrying on trade ...	365	domicile of	16
—on submission to arbitration ...	330	cannot make a will	38, 41
in respect of subject of specific be-		will not revoked by subsequent	
quest	203	insanity	41
—rents, taxes, etc. ...	205	incapacity of, to be executor ...	249
—stocks and shares ...	206	probate cannot be granted to ...	251
provision for payment of, contingent		letter of administration cannot be	
on the estate of the deceased ...	339	granted to	266
Libel—		administration for use and benefit of.	273
in will	279	executor or administrator becomes,	
action for, does not survive ...	319	after grant	273
Lien—		one of several executors or adminis-	
on articles specifically bequeathed,		trators becomes, after grant. 285, 286	
legatee must free	203	sole executor or administrator be-	
on will, solicitor has no ...	269	comes, after grant	273
Limitation—		M	
words of limitation and purchase ...	106	Mad Man—(see lunatic)	
upon a limitation, void	143	Mahomedans—	
does not run against an adminis-		how far governed by Succession Act. 3	
trator until grant	237	wills of	45, 55
does not apply to application for pro-		—not revoked by marriage ...	63
bate and administration ...	304	executor of the will of	232
executor or administrator may retain		no probate or letters of administra-	
debt due to him which is barred by.	338	tion essential	236
—may pay debt barred by ...	337	Mahomedan Law—	
in case of refunding of legacies ...	359	donatio mortis causa according to ..	221
in case of application for revocation		Maintenance—	
of grant	288	bequest with an obligation of ...	182
no probate to be granted until seven		legacy vests, if interest is directed to	
days after the death of testator ...	310	be paid for	152, 156
no letters of administration to be		a gift of an annual sum for, creates	
granted until expiry of 14 days		life interest... ..	209
after death of intestate ...	310	interest on legacy to be applied for,...	352
no limitation runs if an executor is a		Malicious Prosecution—	
debtor	336	actions for, survive	320
for recovery of legacy ...	346	"Malik"—	
Limited Administration—(see Ad-		meaning of	73
ministration)		Marginal No	
Limited Probate—(see Probate)		in will,	68
Lineal Consanguinity—	20	"Marine	
Lineal Descendants—		mean! "	
or		will of	
succession amongst	28		
does not lapse	123		

	PAGE.		PAGE.
Official Trustee—		Pendente Lite— (see <i>Administration</i>).	274
not entitled to probate ...	247	Period of Distribution—	125
appointment of as executor ...	249	on grandsons attaining majority ...	139
Offspring—		Perpetuity—	
bequest to ...	111	rule against ...	131
Old Age—		definition of ...	132
incapacity to make a will from ...	43	applies to moveable as well as im-	
Omission—		moveable property ...	137
of passage of will from probate ...	279	how distinguished from double pos-	
Onerous Bequest— ...	162	sibility ...	134
Onus Probandi—		difference between English and	
on person propounding will ...	43	Indian law as to ...	132
"Or"—		and power ...	135
the word implies substitution ...	104	and charity ...	136
when it prevents lapse ...	104	under Hindu and Mahomedan law ...	137
Oral will— ...	8	gift to a class to be ascertained be-	
revocation of ...	67	yond limits of ...	139
Ornaments—		Personæ Designatæ—	
husband's right to wife's... ..	19	gift to ...	77
Outlaw—		—wife as ...	78
will made by ...	41	Petition for Letters of Adminis-	
Overseers—		tration—	
appointment of ...	251	contents of ...	301, 302
		verification of ...	303
		punishment for false verification ...	303
		procedure when more than one pre-	
		sented ...	302
		Petition for Probate—	
		conclusiveness of ...	298
		contents of ...	299
		verification of ...	303
		punishment for false verification ...	303
		Pledge—	
		article specifically bequeathed pledged	
		by testator, does not operate as	
		ademption ...	203
		by executor or administrator ...	323, 327
		Policy—	
		bequest of a life, testator receives	
		amount, ademption ...	197 (ill. h.)
		Portion— ...	33
		Portioners—	
		definition of portion ...	211
		legacies to ...	211
		according to English law... ..	212
		Portuguese—	
		by what law governed ...	3
		Possibility—	
		double (see <i>Perpetuity</i>) ...	134
P			
Parsis—			
law applicable previous to Succession			
Act ...	33, 34		
rules for intestate ...	34 to 37		
doctrine of advancement does not ap-			
ply to ...	33		
wills of revoked by marriage ...	63		
Parol Evidence— (see <i>Evidence</i>)			
Patent Ambiguity—			
extrinsic evidence not admissible in			
case of ...	84		
Pauper—			
petition <i>in forma</i> ...	300		
Payment—			
of liabilities in respect of subject of			
bequest ...	203		
of future and contingent bequest ...	348		
order of, in case of specific, demonstra-			
tive and general legacies ...	337, 340		
of debts ...	337		
Pencil—			
will may be written in ...	7		
effect of alterations in ...	8		

Rule— <i>contd.</i>	PAGE.	Solicitor—	PAGE.
in <i>Christopherson v. Naylor</i>	... 104	attesting will, precluded from claim-	
in <i>Cripps v. Walcott</i> ...	... 122	ing professional charges under direc-	
in <i>Howe v. Lord Dartmouth</i>	... 350	tion of will ...	... 61 (exs. 10, 11)
		executor, allowance for professional	
		work to ...	... 329
		—, costs incurred in a suit	... 329
		—no profit costs allowed, if estate	
		insolvent ...	... 329
		Son—	
		legacy to a, construction	79, 91, 111
		—first or second construction	... 79
		Sound and Disposing Mind—	
		what constitutes	... 39, 40
		Specific Legacy—	187-194
		definition of	... 187, 189
		distinction between general, demon-	
		strative and...	... 189
		adoption of	... 199
		examples of	... 187, 190
		order of payment of	... 191, 310
		every devise of land is specific	... 190
		executor may sell	... 323
		abatement of	... 341
		assent of executor to	... 342
		interest on	... 353
		State—	
		feudatory	... 14
		Statutes—	
		of Mortmain does not apply to India...	146
		43 Eliz. c. 4	... 147
		Stock—	
		legacy of, whether general or speci-	
		fic	... 188 (III.).
		—when deemed	... 199
		payment of call on	... 206
		fluctuations in price of, when legacy	
		invested	... 310
		Substitutional Gifts—	... 104
		gift to A or B is	... 104
		gift to A or his heirs or his next-	
		of-kin	... 104
		gift to class or their issue	... 104
		prevents lapse	... 120
		Succession—	
		order of, in case of intestacy	... 22
		to moveable property governed by	
		law of domicile	... 10
		—in absence of proof of domicile,	
		to immoveable property to be	
		lated by the law of British I	

	PAGE.		PAGE
Transmissibility—		Vested Interest—contd.	
of vested interest ...	160	rules for determining whether a be-	
of contingent interest ...	160	quest is vested or contingent. 155 <i>et seq.</i>	
of office of executor ...	254	when bequests to members of a class	
Trust—		vest ...	125, 126, 156
precatory, how created ...	184	legacy given on legatee attaining	
secret ...	185	particular age when vest ...	159
difference between gift subject to,		bequest to A for life and then to his	
and gift upon ...	185	children or survivors when vest ...	159
property, administration of ...	276	when contingent bequests vest ...	159
Trustee—		when transmissible ...	160
bequest to, does not lapse ...	124	Vested Remainder ...	134
U		Vesting of Legacies— ...	117, 151
Unborn—		date of vesting ...	152
bequest to persons ...	129, 130	Void Bequests— ...	128
Uncertainty—		bequest to a person not in existence at	
inconsistent wills of same date void for. 90		testator's death ...	129
in respect of subject of bequest ...	91	—an idol not void ...	148
charitable bequests ...	91	W	
bequest of a sum of money to an exe-		Wages—	
cutor for his trouble, not void for... 91		of servants of deceased, payment	
—to one of the sons of A void for 91		of ...	330, 337
—for purposes of liberality and		"Wakas"—	
benevolence void for ...	92	meaning of ...	331
—for charitable or other indefi-		Widow—	
nite purposes void for ...	92	share of, in case of intestacy	
—to "dharam" void for ...	92	Hindu, estate taken by, aboriginal	
for "sara kam" void for... 92		qualified ...	
Undue Influence ...	47	grant of letters of administration ...	
what constitutes ...	47-49	when not entitled to letters of ad-	
evidence of ...	49	ministration ...	
Universal Legatee—(see Residuary		Wife—	
Legatee)		bequest to testator's wife ...	
Privileged Will—		—third person ...	
definition of ...	8	—reputed ...	
execution of ...	57	Will ...	
revival of ...	70	definition of ...	
Unsound Mind—		— <i>testamentary</i> ...	
wills made by persons of... 39		— <i>intestamentary</i> ...	
V		— <i>dispositive</i> ...	
Verbal Will ...	8	— <i>dispositive</i> ...	
Vested Interest—		— <i>dispositive</i> ...	
meaning of "to vest" ...	153	— <i>dispositive</i> ...	
liable to be divested ...	154, 176	— <i>dispositive</i> ...	
how distinguished from contingent in-		— <i>dispositive</i> ...	
terest ...	157	— <i>dispositive</i> ...	
time of vesting ...	152	— <i>dispositive</i> ...	

Will—*contd.*

PAGE.

contingent ...	...	9
conditional ...	...	9
of Hindus ...	...	45
of Mahomedans ...	...	45
of Cutchi Memons ...	...	46
of foreigners ...	...	40
characteristic of ...	...	6
<i>onus probandi</i> on person propounding ...	...	43
made under a mistaken notion of fact ...	...	50
presumption when lost ...	...	66
WHO IS CAPABLE OF MAKING ...	...	38
married women ...	...	40
Aliens ...	...	40
Traitors and felons ...	...	40
<i>persons incapable from want of discretion</i> ...	...	38
infants ...	...	40
idiots ...	...	38, 40
deaf and dumb ...	...	41
blind persons ...	...	40
lunatics ...	...	41
old persons ...	...	43
persons drunk ...	...	43
outlaws ...	...	41
<i>persons incapable from want of liberty or free will</i> ...	...	...
will obtained by fraud, coercion, im-	...	47, 49
portunity, etc., ...	...	50
will executed by mistake ...	...	50
<i>persons incapable from criminal con-</i>	...	...
duct traitors and felons ...	...	40
who can contest a ...	...	290
FORGED, rights under ...	...	312
FORM AND MANNER OF MAKING ...	...	51, 72
...	...	7
I ...	...	...
signature of testator ...	...	52
attestation ...	...	52
materials for writing ...	...	7
execution of privileged will ...	...	59

Will—*contd.*

PAGE.

prepared by a person who takes a	...	4
benefit under it ...	...	4
REVOCATION OF UNPRIVILEGED WILL	...	...
revocable nature of will ...	...	56
whether mutual will revocable ...	...	8
by marriage ...	...	38, 63
by another will or codicil ...	...	63
by some writing ...	...	64
by burning, tearing or destroying ...	...	65
REVOCATION OF PRIVILEGED WILL ...	...	63
DOCTRINE OF DEPENDENT RELATIVE	...	...
REVOCATION ...	...	67
REPUBLICATION OF WILL ...	...	70
consequences of republication ...	...	70
ALTERATIONS IN WILL ...	...	68
mistakes in (see <i>alterations, inter-</i>	...	...
<i>neations</i>) ...	...	...
PROBATE OF (see <i>Probate</i>) ...	...	...
CONSTRUCTION OF—	...	...
general rules of construction ...	...	71
effect to be given to every part of	...	...
will ...	...	85, 89
last of two inconsistent clauses must	...	...
prevail ...	...	90
meaning of any clause to be collected	...	...
from entire instrument ...	...	85
"Malik," "Kul Malik" ...	...	73
"Wasas" ...	...	74
"poutra poutradi" ...	...	73
technical words not necessary ...	...	72
gift to <i>personæ designatæ</i> ...	...	77
same words used in same sense ...	...	89
gift to a class (see <i>Class</i>) ...	...	...
TIME FROM WHICH WILL SPEAKS ...	...	93
WHO CAN CONTEST A WILL ...	...	290

Witnesses—(see *Attesting Witnesses*).

Y

Year—

executor's	346
----------------	-----	-----

